DOCKET

No. 07-10441
Title: Johnnie Corley, Petitioner
v.
United States
Docketed: April 17, 2008
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (04-4716)
Decision Date: August 31, 2007
Rehearing Denied: November 16, 2007
Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jan 31 2008	Application (07A649) to extend the time to file a petition for a writ of certiorari from February 14, 2008 to April 14, 2008, submitted to Justice Souter.
Feb 5 2008	Application (07A649) granted by Justice Souter extending the time to file until April 14, 2008.
Apr 14 2008	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due May 19, 2008)
May 14 2008	Order extending time to file response to petition to and including June 18, 2008.
May 19 2008	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jun 17 2008	Order further extending time to file response to petition to and including July 18, 2008.
Jun 26 2008	Order further extending time to file response to petition to and including July 31, 2008.
Jul 31 2008	Brief of respondent United States in opposition filed.
Aug 13 2008	Reply of petitioner Johnnie Corley filed.
Aug 14 2008	DISTRIBUTED for Conference of September 29, 2008.
Oct 1 2008	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Nov 7 2008	SET FOR ARGUMENT ON Wednesday, January 21, 2009.
Nov 17 2008	Brief of petitioner Johnnie Corley filed.
Nov 17 2008	Joint appendix filed. Statement of costs filed.
Nov 24 2008	Brief amicus curiae of National Association of Criminal Defense Lawyers, et al. filed.
Nov 28 2008	CIRCULATED.
Dec 11 2008	Record received from U.S.C.A. for the 3rd Circuit. (1 envelope and 1 CD)
Dec 17 2008	Brief of respondent United States filed. (Distributed)
Dec 21 2008	Record received from the U.S.D.C. for the Eastern District of Pennsylvania. (1 box)
Jan 13 2009	Reply of petitioner Johnnie Corley filed. (Distributed)
Jan 21 2009	Argued. For petitioner: David L. McColgin, Assistant Federal Defender, Philadelphia, Pa. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C.

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PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

> Whether 18 U.S.C. § 3501 – read together with Fed. R. Crim. P. Rule 5(a), *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957) – requires that a confession taken more than six hours after arrest and before presentment be suppressed if there was unreasonable or unnecessary delay in bringing the defendant before the magistrate judge.

Several United States Courts of Appeals have addressed this issue and have issued conflicting decisions, and the panel in this case was split two to one on the issue.

This Court granted certiorari to consider the issue in *United States v. Alvarez-Sanchez*, 511 U.S. 350 (1994), but then resolved the case on a separate "threshold" ground and expressly left open "the subtle questions of statutory construction concerning the safe harbor set out in § 3501(c)." *Id.* at 356.

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No._____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2007

JOHNNIE CORLEY,
PETITIONER

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit rendered in this case on August 31, 2007. The Third Circuit denied petitioner's petition for rehearing on November 16, 2007.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, which is reported at *United States v. Corley*, 500 F.3d 210 (3d Cir. 2007), is attached in the Federal Reporter format as Appendix A. The Third Circuit's denial of rehearing is attached as Appendix B. The opinion of the district court denying the motion to exclude statements is attached as Appendix C.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment and opinion of the Court of Appeals was entered on August 31, 2007. The Court of Appeals denied rehearing on November 16, 2007. On February 5, 2008, this Court granted petitioner's application for a 60-day extension, and directed that the petition be filed on or before April 14, 2008. This petition is timely filed on that date. *See* Sup. Ct. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3501 provides as follows:

> **(a)** In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.
>
> **(b)** The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.
>
> The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.
>
> **(c)** In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made

voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

Federal Rule of Criminal Procedure 5(a) provides as follows:

(a) In General.

(1) Appearance Upon an Arrest.

(A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.

(B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise.

STATEMENT OF THE CASE

A. Proceedings Below

On November 20, 2003, Johnnie Corley was charged in an indictment with conspiracy to commit armed bank robbery (18 U.S.C. § 371, count one), armed bank robbery (18 U.S.C. § 2113(d), count two), and use and carrying of a firearm in furtherance of a drug trafficking crime (18 U.S.C. § 924(c), count three). (App. 16-17).[1] Following a hearing on Mr. Corley's motion to suppress statements, the district court denied the motion. A jury trial was held September 27-28, 2004, and Mr. Corley was convicted on counts one and two, and acquitted on count three. (App. 20, 424-25). On December 21, 2004, Mr. Corley was sentenced to 170 months' imprisonment, five years' supervised release, a fine of $1000, restitution in the amount of $47,532.76, and a special assessment of $200. (App. 9, 21, 481-86). Mr. Corley timely appealed his conviction, and the United States Court of Appeals for the Third Circuit affirmed his conviction on August 31, 2007. The Court of Appeals denied a petition for rehearing on November 16, 2007.

B. Statement of Facts

On June 16, 2003, the Norsco Federal Credit Union in Norristown, Pennsylvania, was robbed by three men. The only evidence introduced at trial identifying Mr. Corley as a participant in the robbery consisted of two statements law enforcement obtained from Mr. Corley more than six hours after his arrest, and before he was brought to a federal magistrate. Mr. Corley did not see the magistrate until nearly 30 hours after his arrest. The issue raised in this petition is whether these statements were taken in violation of Mr. Corley's right to prompt

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[1] "App." refers to the Appendix on appeal filed in the Third Circuit in this case.

appearance before a federal magistrate upon arrest.

Mr. Corley was arrested at 8:00 a.m. on September 17, 2003, after federal and state law enforcement identified him as a suspect in the bank robbery. Officers arrested him on an outstanding bench warrant from state court. During the arrest, Mr. Corley resisted and had a physical altercation with an FBI agent. As a result, he was placed under federal arrest for assault on a federal officer and taken to a local police station for processing. At 11:45 a.m., he was taken from the police station to a hospital in Philadelphia, where he was admitted at 12:12 p.m. He received five sutures and was discharged at 3:20 p.m. *Corley*, 500 F.3d at 212-13 (majority); 232-33 (Sloviter, J., dissenting).

Mr. Corley was next brought to the FBI office in Philadelphia, arriving at 3:30 p.m. Although the FBI offices are located in the same building as the federal magistrate judges' courtrooms and chambers, he was not presented to a federal magistrate judge. Instead, he was kept in the FBI offices for interrogation regarding the bank robbery. By this point, 7 ½ hours had already elapsed since his arrest. *Id.* at 212 (majority), 233 (Sloviter, J. dissenting). As Judge Sloviter observed, the only apparent reason for the delay in presentment following the hospital discharge was the agents' desire to question Mr. Corley. *Id.* at 237 (Sloviter, J., dissenting).

At 5:07 p.m. – still without being presented to a magistrate judge, and after being informed he was under arrest for assault on a federal officer and under investigation for bank robbery – Mr. Corley signed a waiver of rights form. He confessed shortly afterwards, but when asked to put his confession in writing, said that he was tired and asked to continue the following day. The interrogation resumed at 10:30 a.m. on September 18. Mr. Corley signed a written confession soon afterwards. He finally appeared before a federal magistrate judge to be informed

of his rights at 1:30 p.m. – 29 ½ hours after his arrest. *Id.* at 212.

The district court judge found that both the oral and written statements were voluntary and denied the motion to suppress the statements. (See District Court opinion attached as Appendix C). The district court also found that the oral statement was made within six hours of the arrest. On appeal, however, the majority did not dispute that both statements were outside the six-hour period and that the district court erred in this regard. *Id.* at 220 n.7 (majority); 232 (Sloviter, J., dissenting).[2]

C. The majority and dissenting opinions

The panel majority affirmed the district court's ruling on the ground that it was bound by the prior ruling of the Third Circuit in *Gov't of Virgin Islands v. Gereau*, 502 F.2d 914 (3d Cir. 1974), that voluntary statements are admissible even if they were obtained outside the six-hour time period in § 3501(c) as a result of unreasonable delay.

The majority reasoned that *Gereau* provided a "plausible" reading of the six-hour rule in 18 U.S.C. § 3501(c). *Corley*, 500 F.3d at 217. The majority interpreted § 3501(c) as "merely instruct[ing] trial courts that the inherently coercive effect of a lengthy delay in presentment is not sufficient, *standing alone*, to render a confession involuntary where the delay is either less than six hours or 'reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.'" *Id.* at 218. As the court in *Gereau* read § 3501, the admissibility of all confessions, whether made within or outside the six-hour period, hinges on whether the statement was "voluntary." *Id.* at 217. The *Corley*

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[2] As Judge Sloviter noted, "Even were the time spent receiving medical treatment excluded in calculating the expiration of the safe-harbor period, the confession would nonetheless fall outside that period." *Corley*, 500 F.3d at 233 n.24 (Sloviter, J., dissenting).

majority observed, however, that the Second, Ninth and D.C. Circuits have concluded that this interpretation not only renders the six-hour rule in § 3501 "superfluous," but is contrary to the legislative history. *Id.* at 219. The majority then noted the strength of these arguments:

> Our dissenting colleague cogently argues that the Second, Ninth and D.C. Circuits have the better of the argument regarding the proper interpretation of § 3501. Were we writing on a clean slate, we might agree. As explained above, however, our Court has already resolved these issues in *Gereau*.

Id. Further undermining *Gereau*, the *Corley* majority also noted that *Gereau* itself was based on Second and Ninth Circuit precedent that "those Circuits have since repudiated." *Id.*. The majority acknowledged that this "may be a reason to revisit *Gereau en banc*." *Id.* at 219-20.

Judge Sloviter, in dissent, explained that § 3501 must be read in the context of this Court's decisions in *McNabb v. United States*, 318 U.S. 332 (1943) and *Mallory v. United States*, 354 U.S. 449 (1957), as well as Rule 5(a) of the Federal Rules of Criminal Procedure. In *McNabb*, the Court established an exclusionary rule under which a confession must be suppressed if obtained in violation of a defendant's statutory right upon arrest to be taken immediately before a committing officer. 318 U.S. at 345-47. The requirement of immediate presentment was then codified in Rule 5(a), which requires that an arrested person be taken before the magistrate judge "without unnecessary delay." In *Mallory*, the Court made clear that unnecessary delay alone, as a violation of Rule 5(a), could be the basis for suppression. 354 U.S. at 454-55. This exclusionary rule became known as the *McNabb-Mallory* rule. *See Corley*, 500 F.3d at 229-31 (Sloviter, J., dissenting).

Against this backdrop, § 3501(c) must be read as having "'only excised the first six hours after arrest or detention from the scope of the *McNabb-Mallory* exclusionary rule.'" *Id.* at 232

(Sloviter, dissenting) (quoting *United States v. Superville*, 40 F. Supp. 2d 672, 683 (D.V.I. 1999)). Judge Sloviter thus concluded that since the delay in the instant case was outside the six-hour period allowed under § 3501(c) and lacked any legitimate basis, the *McNabb-Mallory* rule required suppression of Mr. Corley's statements. *Id.* at 238 (Sloviter, J., dissenting).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the split in the circuits over whether statements taken more than six hours after arrest and before presentment should be suppressed under the *McNabb-Mallory* exclusionary rule and 18 U.S.C. § 3501 if there was unreasonable or unnecessary delay in presenting the defendant to a federal magistrate.

Mr. Corley's case presents an excellent vehicle for this Court to resolve a deep split in the circuits regarding an important question of statutory construction in federal criminal practice: the applicability of the *McNabb-Mallory* exclusionary rule in light of 18 U.S.C. § 3501. The circuits are currently split five to three on this issue, and the Third Circuit panel in this case was itself split two to one. The panel majority questioned, but ultimately felt bound by, the circuit's prior decision in *Gereau*.

This Court, moreover, previously granted certiorari in a case raising this issue. In *United States v. Alvarez-Sanchez*, 511 U.S. 350 (1994), the Court took note of the § 3501 issue raised here, but the Court ultimately did not need to reach it because a "threshold inquiry" disposed of the case – the Court determined that since the defendant there was not under arrest for a *federal* offense, the provisions of § 3501 were not triggered. *Id.* at 358. Thus, the Court concluded that it "need not address subtle questions of statutory construction concerning the safe harbor set out in § 3501(c), or resolve any tension between the provisions of that subsection and those of § 3501(a). . . ." *Id.* at 356. In a concurring opinion, Justice Ginsburg expressly noted the division in authority on the issue. *Id.* at 361 & n.* (1994) (Ginsburg, J., concurring) (writing separately "to emphasize that we do *not* decide today a question on which the Courts of Appeals remain divided: the effect of § 3501(c) on confessions obtained more than six hours after an arrest on

federal charges").

The issue is especially important because it is one that potentially arises in every federal criminal case in which a statement is taken after arrest. It is untenable to lack a consistent federal rule regarding the admissibility of such critical evidence. Likewise, it is untenable for federal law enforcement agents to have inconsistent rules to apply in federal districts across the country regarding how quickly they must present a defendant to a magistrate following arrest and the taking of a statement. The time is ripe for this Court to resolve the issue, and this case factually presents an ideal vehicle for doing so.

A. The *McNabb-Mallory* exclusionary rule and 18 U.S.C. § 3501

This Court has long recognized the defendant's right to prompt presentment before a judicial officer following arrest. The Court first addressed the issue in *McNabb v. United States*, 318 U.S. 332 (1943), in which federal officers held the defendants in custody and interrogated them for several days before bringing them to a judicial officer. *Id.* at 334-38. The Court ruled that procuring the defendants' confessions in this manner violated their statutory right to be presented promptly to the nearest judicial officer, and the confessions had to be excluded. *Id.* at 344-46. Three years later, the *McNabb* ruling became embedded in the Federal Rules of Criminal Procedure with the adoption of Rule 5(a), requiring that federal officers take an arrested person before a judicial officer "without unnecessary delay." Fed. R. Crim. P. 5(a).

The Court next addressed the issue of presentment delay in *Upshaw v. United States*, 335 U.S. 410 (1948). *Upshaw* made clear that delay in presentment for the purpose of procuring a confession is "unnecessary delay" in violation of Rule 5(a), and requires exclusion under *McNabb*. *Upshaw*, 335 U.S. at 414. The Court reiterated this exclusionary rule in *Mallory v.*

United States, 354 U.S. 449 (1957), holding again that admission of a defendant's statement taken in violation of Rule 5(a) is improper. *Id.* at 453. The Court emphasized that the prohibition on "unnecessary delay" means that any delay in presentment "must not be of a nature to give opportunity for the extraction of a confession." *Id.* at 455. This exclusionary rule has become known as the "*McNabb-Mallory* exclusionary rule." *Corley*, 500 F.3d at 214.

Congress responded in 1968 to the *McNabb-Mallory* exclusionary rule, and also to the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring that warnings be given to those in custody), with the passage of 18 U.S.C. § 3501. *See Dickerson v. United States*, 530 U.S. 428, 436 (2000) (observing that § 3501 was intended to overrule *Miranda*). Subsections (a) and (b) of § 3501 address the *Miranda* rule, and subsection (c) addresses the *McNabb-Mallory* rule. The key statutory language is as follows:

> (a) In any criminal prosecution . . . a confession . . . shall be admissible in evidence if it is voluntarily given. . . .
>
> (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the given confession . . . .
>
> (c) In any criminal prosecution . . . a confession made . . . while such person was under arrest or other detention . . . shall not be inadmissible solely because of delay in bringing such person before a magistrate . . . if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay . . . beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate . . . .

18 U.S.C. § 3501 (emphasis added). Section 3501(c), thus creates a six-hour "safe harbor" – any statements taken during the first six hours after arrest are not inadmissible solely because of delay in presentment. The question raised here is whether § 3501 completely eliminated the *McNabb/Mallory* exclusionary rule, or whether it just excised the first six hours after arrest from the scope of this rule.

B. The circuit split regarding the applicability of the *McNabb-Mallory* rule in light of 18 U.S.C. § 3501 is entrenched and will not be resolved without this Court's intervention.

In addition to the Third Circuit, the First, Sixth, Eighth and Tenth Circuits have ruled that § 3501 completely eliminates the *McNabby-Mallory* exclusionary rule. These circuits hold that voluntariness is the sole criterion for admissibility, and unnecessary delay alone cannot be a basis for exclusion of statements, regardless of how long after the arrest the statements are made. *See United States v. Beltran*, 761 F.2d 1, 8 (1st Cir. 1985); *United States v. Christopher*, 956 F.2d 536, 538-39 (6th Cir. 1991); *United States v. Bear Killer*, 534 F.2d 1253, 1256-57 (8th Cir. 1976); *United States v. Glover*, 104 F.3d 1570, 1583 (10th Cir. 1997). In these five circuits, accordingly, the *McNabb/Mallory* exclusionary rule no longer exists, and federal law enforcement agents can unreasonably delay presentment of a defendant to a federal magistrate, so long as there is no evidence that the delay rendered any confession during that time involuntary.[3]

The Second, Ninth and D.C. Circuits have taken the opposite position, holding that unreasonable delay alone can be a basis for exclusion of a confession if the confession was taken outside the six-hour "safe harbor" provided in Section 3501(c). *See United States v. Perez*, 733

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[3] As Judge Sloviter observed, "[t]he courts have generally equated 'unnecessary' to 'unreasonable.'" *Corley*, 500 F.3d at 236 (Sloviter, J., dissenting). Rule 5(a) bars "unnecessary delay," while § 3501(c) uses "reasonable" as the standard. *Id.*

F.2d 1026, 1031 (2d Cir. 1984); *United States v. Alvarez-Sanchez*, 975 F.2d 1396, 1402-03 (9th Cir. 1991), *rev'd on other grounds*, 511 U.S. 350 (1994); *United States v. Robinson*, 439 F.2d 553, 563-64 (D.C. Cir. 1970). Thus, in these three circuits the *McNabb-Mallory* rule still applies if the confession was obtained more than six hours after arrest. Federal agents in these circuits cannot unreasonably delay presenting the defendant to a magistrate without risking exclusion of the confession based on the delay alone. The Seventh Circuit has taken a similar approach, holding "that a district judge retains discretion to exclude a confession where there is delay in excess of six hours," but that the exercise of that discretion depends on a number of factors, including "the deterrent purpose of the exclusionary rule." *United States v. Gaines*, 555 F.2d 618, 623-24 (7th Cir. 1977).[4]

The panel majority, following *Gereau*, ruled that voluntariness is the sole ground for suppression under Section 3501(a) and that Section 3501(c) can plausibly be read as simply narrowing the circumstances under which unreasonable delay alone can warrant a finding of involuntariness. *Corley*, 500 F.3d at 217. But as the Second Circuit persuasively explains, if Congress had intended voluntariness to be the sole ground for suppression, the statute would have been worded differently:

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[4] *See also United States v. Superville*, 40 F. Supp. 2d 672, 681-83 (D.V.I. 1999) (holding *McNabb-Mallory* exclusionary rule remains fully applicable to confessions taken outside the six-hour period); *United States v. Wilbon*, 911 F. Supp. 1420, 1426 (D.N.M. 1995) (holding that § 3501 "provides two independent bases for excluding confessions at trial: (1) voluntariness; and (2) unreasonable delay as carefully delineated in subsection (c)"). Wigmore supports a similar interpretation of § 3501(c), asking, "What . . . is the status of confessions obtained without arraignment after a six-hour delay, not within the proviso? Is it the intent of Congress that as to these the *McNabb-Mallory* 'delay per se invalidates' approach still exists? Probably so, because if the intent were otherwise no time limits at all would have been included in the enactment." 3 Wigmore, *Evidence* § 862(a) at 623 (Chadbourn rev. 1970).

> Congress, in subsection (c), specifically used the term "inadmissible solely because of delay." If voluntariness were the only basis upon which admissibility turned under § 3501, then the statute would have contained language to the effect that "a confession shall not be deemed *involuntary* solely because of delay." In view of the fact that Congress coupled the word "inadmissible" with "delay," the meaning of subsection (c) must be that delay may serve as the basis for a separate, independent exclusionary remedy.

United States v. Perez, 733 F.2d 1026, 1031 (2d Cir. 1984) (emphasis in original).

Making a similar point, Judge Sloviter in her dissent observes that the majority's interpretation entirely fails to address the use of "and" in Section 3501(c): "If voluntariness is all, I ask the majority, how does it explain the 'and' which explicitly makes admissibility of a confession dependent on *both* voluntariness and presentment within six hours of arrest?" *Corley*, 500 F.3d at 235-36 (Sloviter, J., dissenting). The Third Circuit's interpretation of § 3501, under which admissibility depends only on voluntariness, would render § 3501(c) superfluous. *Id.* at 235; *Perez*, 733 F.2d at 1031.

As Judge Sloviter concludes, accordingly, in passing § 3501, Congress was not overruling *McNabb* or *Mallory*, but instead was excising the first six hours after arrest from the scope of the *McNabb-Mallory* exclusionary rule. *Corley*, 500 F.3d at 232 (Sloviter, J., dissenting). In view of the deep and entrenched division in the circuits over this issue, only this Court's review can bring uniformity to the interpretation of this important federal statute.

C. The admissibility of confessions in federal criminal trials under § 3501 is a critically important issue on which the federal courts should have a uniform stance.

As this Court stated in *McNabb*, "[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards

of procedure and evidence." 318 U.S. at 340. Since a confession is the most damning evidence against a defendant, the standards for admissibility of confessions set out in § 3501 should be given uniform interpretation in federal courts across the country. It makes no sense for the admissibility of such evidence to depend on the circuit in which the defendant is prosecuted. Federal law enforcement agents should be held to the same standard throughout the country regarding the securing of confessions and the requirement that defendants be presented to a federal magistrate without unnecessary delay. Thus, the issue presented here, on which the circuits are clearly divided, is an especially important one that merits resolution by this Court.

D. This case presents an ideal vehicle for resolution of the circuit split.

This case presents in stark relief the § 3501 issue that has split the circuits. There are no disputes regarding the essential facts. Unlike the defendant in *Alvarez-Sanchez*, there is no question but that Mr. Corley was under federal arrest, and thus the provisions of § 3501 were triggered. *See Alvarez-Sanchez*, 511 U.S. at 358. There are also no disputes over the timing of the arrest, the two statements, or the intervening events. The second statement was plainly outside the six-hour safe harbor, and as Judge Sloviter observes, "[t]he majority chooses not to dispute Corley's argument that the District Court erred in concluding that the agent's [first] interrogation was within that six-hour safe-harbor period." *Corley*, 500 F.3d at 232 (Sloviter, dissenting).

The record makes clear, moreover, that the only reason for the delay in presenting Mr. Corley to the magistrate following his medical treatment was the agents' desire to question him and extract a confession. *Id.* at 237 (Sloviter, J., dissenting) (citing App. 78, 92). This case thus fits the paradigm of "unnecessary delay" set out by this Court in *Mallory*, 354 U.S. at 455

(holding that the phrase "without unnecessary delay" means that "the delay must not be of a nature to give opportunity for the extraction of a confession"). *See Corley*, 500 F.3d at 214 (under *McNabb-Mallory* rule, "the paradigm of 'unnecessary delay' is when it is solely for the purpose of eliciting a confession").

Lastly, the confession provided truly critical evidence, since there was no other evidence linking Mr. Corley to the robbery. *Id.* at 229 n.17 (Sloviter, J., dissenting). Accordingly, this case very neatly presents the question whether a statement should be excluded under § 3501(c) and the *McNabb-Mallory* rule if it is outside the six-hour period and the delay in presentment was unreasonable or unnecessary.

CONCLUSION

For the foregoing reasons, petitioner, Johnnie Corley, requests that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted,

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OPPOSITION BRIEF

No. 07-10441

IN THE SUPREME COURT OF THE UNITED STATES

JOHNNIE CORLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether 18 U.S.C. 3501 permits the suppression of a voluntary confession that was made more than six hours after a defendant's arrest on federal charges, but before his presentment to a magistrate, as a consequence of an unreasonable delay in presentment.

IN THE SUPREME COURT OF THE UNITED STATES

No. 07-10441

JOHNNIE CORLEY, PETITIONER

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TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A29) is reported at 500 F.3d 210. The memorandum and order of the district court denying petitioner's motion to suppress his confessions (Pet. App. C1-C6) is not reported but is available at 2004 WL 1102367.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 2007. A petition for rehearing was denied on November 16, 2007. On February 5, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including April

14, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiring to commit armed bank robbery, in violation of 18 U.S.C. 371, and armed bank robbery, in violation of 18 U.S.C. 2113(d). He was sentenced to 170 months of imprisonment, to be followed by five years of supervised release. Pet. App. A4. The court of appeals affirmed.

1. On June 16, 2003, three men robbed the Norsco Federal Credit Union in Norristown, Pennsylvania. Pet. App. A3. Federal officials identified petitioner as a suspect in the robbery, and they later learned that there was an outstanding state bench warrant for his arrest for an unrelated crime. Ibid. On September 17, 2003, a team of federal and state officers sought to execute the state arrest warrant. Ibid. Petitioner attempted to evade arrest: he backed his Jeep into an officer's car, pushed his nine-year-old daughter into another officer, and then led the officers on a lengthy foot chase down a public street, through private yards and a creek, and up an embankment. Gov't C.A. Br. 7. Petitioner was ultimately arrested at about 8:00 a.m. on charges of assaulting a federal officer. Pet. App. A3; Gov't C.A. Br. 8.

Petitioner's hand was injured during his altercation with the

officers. Gov't C.A. Br. 8. At approximately 11:45 a.m., after having been processed at the Sharon Hill Borough Police Department, petitioner was transported to a hospital, where he received five stitches and medication. Pet. App. A3; Gov't C.A. Br. 8. Petitioner was then taken to the Philadelphia FBI office, arriving at about 3:30 p.m. Pet. App. A3.

At the FBI office, petitioner was given food and drink and was informed that he was under arrest for assaulting a federal officer and under investigation for the credit-union robbery. Pet. App. A3; Gov't C.A Br. 8. At 5:07 p.m., petitioner was verbally advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), was given a written advice-of-rights form, and signed a written waiver. Pet. App. A3; Gov't C.A. Br. 9. Between 5:27 and 6:38 p.m., petitioner orally confessed to the credit-union robbery. Pet. App. A3; Gov't C.A. Br. 9. The agents asked petitioner to make a written confession as well, but petitioner stated that he was tired and asked to continue the following day. Pet. App. A3. The agents agreed, and the interrogation was suspended. Ibid. At 10:30 the following morning, the interrogation resumed. Ibid. Petitioner was advised of his Miranda rights a second time, and he signed a written confession shortly thereafter. Ibid.; Gov't C.A. Br. 9. At 1:30 p.m., petitioner appeared before a federal magistrate judge. Pet. App. A3.

2. Petitioner moved to exclude his oral and written confes-

sions, arguing that they were obtained in violation of Federal Rule of Criminal Procedure 5(a)(1)(A), which states, in pertinent part, that "[a] person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge." The district court denied the motion. Pet. App. C1-C6. The court stated that 18 U.S.C. 3501(c) "provides a 'safe harbor' for law enforcement, setting a six-hour window within which otherwise admissible confessions may not be excluded solely on the basis of the defendant not having been brought before a magistrate judge." Id. at C2-C3. The district court concluded that the three-hour-and-forty-five-minute period during which petitioner was receiving medical care "is excluded from the six-hour window provided by § 3501" and that petitioner's oral confession thus fell within the six-hour safe harbor. Id. at C3-C4. With respect to petitioner's written confession, the district court concluded that "a break from interrogation requested by an arrestee who has already begun his confession does not constitute unreasonable delay under Rule 5(a)" and that "the period between [petitioner's] arrest and his written confession was not 'unnecessary' for the purposes of [that rule]." Id. at C4-C5.

3. A divided panel of the court of appeals affirmed in a published opinion. Pet. App. A1-A29.

a. The majority explained that 18 U.S.C. 3501 was enacted in 1968 in response to this Court's decisions in McNabb v. United

States, 318 U.S. 332 (1943), Mallory v. United States, 354 U.S. 449 (1957), and Miranda v. Arizona, 384 U.S. 436 (1966). Pet. App. A6. Section 3501(a) provides that, in federal prosecutions, "a confession * * * shall be admissible in evidence if it is voluntarily given." 18 U.S.C. 3501(a). Section 3501(b) "instructs the trial judge to determine the voluntariness of a confession by 'tak[ing] into consideration all the circumstances surrounding the giving of [it],'" and it sets forth "a nonexclusive list" of five relevant circumstances, "including 'the time elapsing between arrest and arraignment,'" whether the confession "'was made after arrest and before arraignment,' and whether the defendant had been advised of his rights before making the confession." Pet. App. A6 (quoting 18 U.S.C. 3501(b)). And Section 3501(c) states that a confession "shall not be inadmissible solely because of delay in bringing [the defendant] before a magistrate judge" so long as the "confession is found by the trial judge to have been made voluntarily and if the weight to be given to the confession is left to the jury and if [the] confession was made or given * * * within six hours immediately following [the defendant's] arrest." 18 U.S.C. 3501(c). Section 3501(c) further provides that the six-hour "time limitation * * * shall not apply in any case in which the delay in bringing [the defendant] before [a] magistrate judge * * * beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and

the distance to be traveled to the nearest available such magistrate judge." Ibid.

Relying on its previous decision in Government of the Virgin Islands v. Gereau, 502 F.2d 914 (3d Cir. 1974), cert. denied, 420 U.S. 909 (1975), the court of appeals held that Section 3501(a) "makes voluntariness the sole criterion for admissibility of a confession." Pet. App. A8. The court explained that Section 3501(c) "instructs courts that they may not find a confession involuntarily 'solely' because of the length of presentment delay where the confession is otherwise voluntary and where the delay is less than six hours (or longer than six hours but explained by transportation difficulties)." Ibid. The court noted that "at least four other Courts of Appeals read the statute in essentially the same way." Ibid. (citing cases). The court of appeals acknowledged that three other circuits had held that Section 3501(c) also permits the exclusion of a confession made outside the six-hour safe harbor period if the confession was "elicited after a period of 'unnecessary delay' within the meaning of Rule 5(a)," and it remarked that "[w]ere we writing on a clean slate, we might agree." Id. at A10. But the court determined that it was bound by Gereau's construction of Section 3501, and it affirmed petitioner's convictions because it understood the district court to have held that petitioner's confessions were voluntary, petitioner had not "seriously dispute[d]" that conclusion, "and we discern no error in

it." Id. at A11. In light of that holding, the court of appeals found it "unnecessary * * * to address the [d]istrict [c]ourt's holding that [petitioner's] oral confession should be treated as having been made within six hours of arrest," although it observed that "that conclusion is contrary to the text of the statute." Id. at A11 n.7.[1]

b. Judge Sloviter dissented. Pet. App. A19-A29. In her view, the general rule is that "even a voluntary statement may be excluded if the presentment delay is unreasonable or unnecessary," id. at A27, and Section 3501(c) merely creates a "safe harbor period" during which a confession may be excluded only if it was involuntary, id. at A28; see id. at A27 (observing that "courts have generally equated 'unnecessary' [the term used in Federal Rule of Criminal Procedure 5(a)(1)(A)] to 'unreasonable' [which appears in the final clause of Section 3501(c)]"). Judge Sloviter also disagreed with the district court's conclusion that the time petitioner spent receiving medical treatment should be excluded for purposes of calculating the six-hour safe harbor period, id. at A24, and she argued that the delay in bringing petitioner before the magistrate had been "unnecessary" within the meaning of Federal Rule of Criminal Procedure 5(a)(1), see Pet. App. A27-A29.

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[1] The court of appeals also rejected a variety of other claims relating to petitioner's sentence that petitioner does not renew before this Court. See Pet. App. A11-A19.

ARGUMENT

The court of appeals correctly rejected petitioner's contention (Pet. 14-15) that 18 U.S.C. 3501 permits the suppression of a voluntary confession made more than six hours after arrest, but before presentment, as a consequence of an unreasonable delay in presentment. Although petitioner is correct (Pet. 13-15) that the courts of appeals are divided on that question, the conflict has generated relatively few decisions in recent years, likely because other legal remedies protect against the abuses at which a suppression remedy for delayed presentment was originally aimed. Absent a pressing need for resolution of the conflict over Section 3501(c), which decisional law and experience does not reveal, the Court's expenditure of its certiorari resources is not warranted.

1. In McNabb v. United States, 318 U.S. 332 (1943), this Court, "[i]n the exercise of its supervisory authority over the administration of criminal justice in the federal courts," id. at 341, held inadmissible confessions obtained as the direct result of federal officers' failure to comply with statutes mandating that an arrested person be taken promptly before the nearest committing magistrate. In 1946, the statutes on which the Court relied in McNabb were superseded by the adoption of Federal Rule of Criminal Procedure 5. In Mallory v. United States, 354 U.S. 449, 453-456 (1957), the Court relied on McNabb's reasoning in ordering the suppression of a confession by a defendant who had not been

promptly taken before a magistrate as required under the then-current version of Federal Rule of Criminal Procedure 5(b). In 1968, Congress enacted 18 U.S.C. 3501 as "a legislative reaction to McNabb, Mallory, and Miranda [v. Arizona, 384 U.S. 436 (1966)]." Pet. App. A5; see Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 701, 82 Stat. 210. The current version of Federal Rule of Criminal Procedure 5(a)(1)(A) -- which states in pertinent part that "[a] person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge" -- was promulgated in 2002.

As the court of appeals correctly held, Section 3501 displaces the McNabb-Mallory rule and makes voluntariness the sole non-constitutional test for determining the admissibility of a confession in federal prosecutions. Section 3501(a) expressly provides that "a confession * * * shall be admissible if it is voluntarily given." 18 U.S.C. 3501(a). Cf. Dickerson v. United States, 530 U.S. 428, 436 (2000) (noting "§ 3501's express designation of voluntariness as the touchstone of admissibility"). Section 3501(c), in turn, creates a six-hour safe harbor period during which a confession "shall not be inadmissible solely because of delay in bringing [a defendant] before a magistrate." 18 U.S.C. 3501(c). Section 3501(c) does not, however, prescribe what consequences follow when a confession is made outside the six-hour safe harbor period: the statute provides only that some confessions

shall be admitted; it does not state that all others must be suppressed.

Petitioner errs in contending (Pet. 15) that reading Section 3501(a) in accordance with its plain terms "would render § 3501(c) superfluous." Petitioner does not and could not assert that the interpretation adopted by the court below makes Section 3501(c) "superfluous" in the sense that Section 3501(c) has no effect in any case. As the court of appeals recognized (Pet. App. A9), in cases where a confession is made within six hours of arrest, Section 3501(c) plainly precludes a district judge from declaring the confession inadmissible based solely on the delay in presentment.

At heart, petitioner's contention is that construing Section 3501(a) as written would override what he asserts is the negative pregnant of Section 3501(c) -- i.e., that there must be some circumstances in which a delay in presentment will render suppression appropriate regardless of whether a confession was voluntary. See Pet. 14-15 (noting that Section 3501(c) provides that a confession "shall not be inadmissible solely because of delay" if it "is found by the trial judge to have been voluntary and * * * if such confession was made" within six hours of arrest) (emphases added). Whatever negative implications might otherwise be drawn from Section 3501(c) standing alone, however, cannot override what Congress has expressly said in Section 3501(a). See Springer v.

Government of Philippine Islands, 277 U.S. 189, 206 (1928) (negative implications drawn from statutory language and canons of construction must yield when "a contrary intention on the part of the law-maker is apparent"); see also Field v. Mans, 516 U.S. 59, 67-68 (1995); Burns v. United States, 501 U.S. 129, 136-137 (1991).

In any event, there is no conflict between the negative implication of Section 3501(c) -- i.e., that delay in presenting the defendant to a magistrate judge can sometimes affect the admissibility of a confession -- and the language of Section 3501(a). The two subsections can be read consistently, together with Section 3501(b), to produce the following regime: confessions are to be admitted if they are voluntary (Section 3501(a)); voluntariness turns on a consideration of a variety of factors, including any period of delay after arrest and before presentment (Section 3501(b)); if the confession is given before presentment but within six hours of arrest, the delay in presentment shall not be a basis for holding the confession inadmissible (Section 3501(c)); but if the confession occurs outside that six-hour period, the "safe harbor" of Section 3501(c) is unavailable, and the delay in presentment may in some circumstances justify a finding of involuntariness, either alone (in cases where the delay is extraordinarily long and oppressive) or in conjunction with other factors set forth in Section 3501(b). See U.S. Br. at 26-30, United States v. Alvarez-Sanchez, 511 U.S. 350 (1994) (No. 92-1812)

(explaining that the legislative history confirms the view that Section 3501 makes voluntariness the sole inquiry about the admissibility of a confession).

2. Although most of the decisions on the issue are relatively dated, the lower courts are divided on whether Section 3501 makes voluntariness the sole nonconstitutional test for the admissibility of a confession in federal prosecutions, or whether the statute also permits (or even requires) the exclusion of a voluntary confession as a sanction for unreasonable presentment delay when the period between arrest and presentment was longer than six hours. The Third, Sixth, and Tenth Circuits have expressly adopted the former view. See Pet. App. A8-A11 (decision below); United States v. Glover, 104 F.3d 1570, 1583 (10th Cir. 1997) (stating that, under Section 3501, "[v]oluntariness is the sole test for admissibility of a confession") (quoting United States v. Shoemaker, 542 F.2d 561, 563 (10th Cir.), cert. denied, 429 U.S. 1004 (1976)); United States v. Christopher, 956 F.2d 536, 538-539 (6th Cir. 1991) ("unnecessary delay, standing alone, is not sufficient to justify the suppression of an otherwise voluntary confession under 18 U.S.C. § 3501"), cert. denied, 505 U.S. 1027 (1992).[2] The

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[2] In United States v. Bear Killer, 534 F.2d 1253 (1976), the Eighth Circuit stated that voluntariness is "the critical inquiry under Section 3501" and that "delay alone will not render a confession inadmissible." Id. at 1257. In its later decision in United States v. Hornbeck, 118 F.3d 615 (1997), however, that same court stated that a confession made more than six hours after arrest but before presentment is properly admitted "only if

First Circuit has twice upheld the admission of confessions that were made more than six hours after arrest and before presentment after determining that the confession was voluntary. See United States v. Rosario-Diaz, 202 F.3d 54, 70 (2000); United States v. Beltran, 761 F.2d 1, 8 (1985). In Beltran, the court expressly concluded that the extent of presentment delay had been "unreasonable," but stated that "[a] lapse of time between arrest and initial appearance, standing alone, does not require the exclusion of a statement made during th[e] period" of unreasonable delay, and it held that the defendant's confession had been properly admitted because that period had not been "used by the various law enforcement agencies for proscribed purposes envisioned by the Supreme Court when it created its exclusionary remedy for violation of the defendant's right to a prompt arraignment." 761 F.2d at 8.

Other circuits have held that Section 3501 preserves the McNabb-Mallory rule in whole or in part with respect to confessions made outside the six-hour safe harbor provided by Section 3501(c). The District of Columbia Circuit has held that unreasonable presentment delay, standing alone, mandates suppression in such circumstances. United States v. Robinson, 439 F.2d 553, 563-564

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* * * the delay in bringing [the defendant] before a magistrate was reasonable" and the "statement was voluntary." Id. at 618. See Pet. App. A8 n.4 (interpreting that statement from Hornbeck as "refer[ring] to the circumstances under which the six-hour period may be extended, rather than * * * the standards that apply to a confession elicited outside that period").

(1970) (stating that "[u]nder Mallory a confession made during a period of unnecessary delay in complying with the requirement that the defendant be taken before a magistrate is inadmissible at his trial" and that "18 U.S.C. § 3501(c) does not nullify this judicial rule of evidence, but only restricts its application in circumstances" where the confession is made within the first six hours following arrest) (footnote omitted). The Second, Seventh, and Ninth Circuits have held that courts have discretion to suppress voluntary statements made more than six hours after arrest based on unreasonable presentment delay and that, in deciding whether to exercise that power, they should consider factors such as judicial integrity, the need to discourage unnecessary presentment delay, and the need to prevent involuntary confessions. United States v. Mansoori, 304 F.3d 635, 660 (7th Cir. 2002) ("A voluntary confession that occurs after the six-hour safe-harbor period may be inadmissible pursuant to McNabb, Mallory, and their progeny. Exclusion is not automatic but discretionary[.]"), cert. denied, 538 U.S. 967 (2003); United States v. Van Poyck, 77 F.3d 285, 288 (9th Cir.) ("Statements made outside the six-hour 'safe harbor' may be excluded solely for delay, but a court is not obligated to do so."), cert. denied, 519 U.S. 912 (1996); United States v. Perez, 733 F.2d 1026, 1035 (2d Cir. 1984) ("discretion is vested in a district court judge to exclude a confession upon his finding that a delay of more than six hours was not reasonable").

In 1993, this Court granted a government petition for a writ of certiorari that sought review of several questions pertaining to the application of Section 3501(c), including the question that is presented by this petition. See Pet. at 13-14, United States v. Alvarez-Sanchez, 511 U.S. 350 (1994) (No. 92-1812). The Court resolved that case by agreeing with the government's principal submission, i.e., that Section 3501(c) does not apply to statements made by a person who is being held solely on state charges. See 511 U.S. at 355-360.[3] As a result, the Court found it unnecessary to address the "subtle questions of statutory construction" involved in determining "whether § 3501(c) requires suppression of a confession that is made by an arrestee prior to presentment and more than six hours after arrest, regardless of whether the confession was voluntarily made." Id. at 355-356; see id. at 361 (Ginsburg, J., concurring) ("I write separately only to emphasize that we do not decide today a question on which the Courts of Appeals remain divided: the effect of §3501(c) on confessions obtained more than six hours after an arrest on federal charges.").

During the 14 years since Alvarez-Sanchez was decided, little evidence has emerged that Section 3501(c) plays a major role in

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[3] As noted previously, petitioner was arrested as part of a joint operation by federal and state authorities whose immediate goal was to execute a state warrant for his arrest. The courts below expressly determined, however, that petitioner was "placed under federal arrest for assault on a law enforcement officer" from the beginning, Pet. App. A3, C1, and the government did not contend otherwise before the court of appeals, see Gov't C.A. Br. 8, 14-26.

federal criminal law. Several post-Alvarez-Sanchez decisions have expressly rejected the argument that Section 3501 permits the suppression of a voluntary confession made outside the six-hour safe harbor period and have upheld the admission of the confessions in question based solely on the ground that they were voluntary. See Pet. App. A11 (decision below); United States v. Ostrander, 411 F.3d 684, 696 (6th Cir.) (unpublished appendix), cert. denied, 546 U.S. 956 (2005); United States v. Johnson, No. 98-3138, 2000 WL 712385, at *6-*7 (6th Cir. May 24, 2000), cert. denied, 531 U.S. 1025 (2000); United States v. Valme, No. 98-1340, 1999 WL 519232, at *4-*5 (6th Cir. July 16, 1999); Glover, 104 F.3d at 1583. Other courts of appeals have reiterated their pre-Alvarez-Sanchez holdings that unreasonable delays in presentment that exceed six hours may sometimes warrant suppression of a voluntary confession, but they have done so in the course of declining to order suppression in the particular cases before them. See United States v. Gamez, 301 F.3d 1138, 1143 (9th Cir. 2002), cert. denied, 538 U.S. 1067 (2003); Van Poyck, 77 F.3d at 288-290; United States v. Fullwood, 86 F.3d 27, 30-32 (2d Cir.), cert. denied, 519 U.S. 585 (1996). In a 2002 decision, the Seventh Circuit held that a district court had erred in not suppressing a confession made more than six hours after arrest based solely on grounds of unreasonable presentment delay, but it affirmed the defendant's convictions because it concluded that the error had been harmless. See

Mansoori, 304 F.3d at 660-663. Finally, a handful of post-Alvarez-Sanchez district court decisions have ordered suppression of confessions based solely upon a finding of unreasonable presentment delay where the delay exceeded six hours. See, e.g., United States v. Pena Ontiveros, 547 F. Supp. 2d 323, 342-346 (S.D.N.Y. 2008); United States v. Wilbon, 911 F. Supp. 1420, 1432 (D.N.M. 1995); United States v. Evans, No. CR-95-H-67-E, 1995 WL 254422, at *2-*3 (N.D. Ala. Apr. 17, 1995).

The relatively small number of decisions involving Section 3501(c) since Alvarez-Sanchez suggests that issues surrounding confessions obtained more than six hours after arrest but before presentment do not arise with great frequency. In addition, the courts of appeals that have held that Section 3501 does not permit suppression of a voluntary confession made outside the six-hour safe harbor period have nonetheless stated that delay in presentment is a factor that may be considered in assessing voluntariness. See Pet. A8-A9; Glover, 104 F.3d at 1583; Christopher, 956 F.2d at 538. As a result, the division among the lower courts will affect the outcome only in that category of cases where: (i) the defendant is arrested on federal charges but is not taken before a magistrate within six hours of arrest; (ii) the delay in presentment beyond six hours is not reasonable; (iii) the defendant confesses during the period beyond six hours in which presentment was unreasonably delayed; (iv) the confession is not inadmissible under Miranda or

the Fourth Amendment exclusionary rule; and (v) neither the delay alone nor the delay in conjunction with any other relevant factor renders the confession involuntary under the standards set forth in Section 3501(b). It would appear that not many such cases exist. Indeed, the court of appeals did not determine whether this is such a case. The government argued below "that there were reasonable grounds for each of the steps which caused delay in [petitioner's] presentment to the magistrate," Gov't C.A. Br. 14-15; see id. at 14-26,[4] but the court of appeals majority did not address the issue because it concluded that Section 3501 "narrows the meaning of 'unnecessary delay' [in Federal Rule of Criminal Procedure 5(a)(1)(A)] by restricting it to delays that are part of making a defendant's statements 'involuntary,'" Pet. App. A8.

On balance, it does not appear that certiorari is warranted at this time. The conflict on the meaning of Section 3501(c) does not appear to arise with sufficient frequency to justify review, and other legal rules (such as Miranda) largely protect against the abuses at which McNabb and Mallory were originally aimed. Indeed,

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[4] In brief, the government's position is that the delay in bringing petitioner before the magistrate was reasonable because a period of three hours and forty-five minutes was attributable to the need to obtain medical treatment for petitioner's injuries, meaning that the period of other delay before petitioner's oral confession was less than six hours; petitioner was twice advised of his rights and was treated respectfully throughout; petitioner has made no assertion that his statements were coerced in any way; and petitioner was detained overnight only after he had already made an oral confession and said he was tired and wanted to rest.

whatever delay occurred here, it is undisputed that petitioner received Miranda warnings and that petitioner's confessions were entirely voluntary. Pet. App. A11. Nor does the case law or any other source of information suggest that federal officers have a pattern of disregarding the requirement of Federal Rule of Criminal Procedure 5(a)(1)(A) that an arrestee is to be taken before a magistrate judge "without unnecessary delay." Accordingly, this Court's review of a question of federal law that seems to have relatively little impact on federal law enforcement is not necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Acting Solicitor General

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Acting Assistant Attorney General

THOMAS E. BOOTH
Attorney

JULY 2008

REPLY BRIEF

No. 07-10441

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

JOHNNIE CORLEY,
PETITIONER,

- VS -

UNITED STATES OF AMERICA,
RESPONDENT

CERTIFICATE OF SERVICE

DAVID L. McCOLGIN hereby certifies:

That he is a member of the Bar of the Supreme Court of the United States.

That on August 13, 2008, the Petitioner's Reply Memorandum in the above-entitled case was sent by Federal Express Overnight Delivery properly addressed to the Clerk of the Supreme Court of the United States.

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Dated this 13th day of August, 2008.

No. 07-10441

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2007

JOHNNIE CORLEY,
PETITIONER,

- VS -

UNITED STATES OF AMERICA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITIONER'S REPLY MEMORANDUM

Reasons for Granting the Writ

The United States argues that voluntariness is the sole criterion for admissibility of a confession under 18 U.S.C. § 3501(a). The United States further argues that the six-hour time limitation in § 3501(c) merely narrows the circumstances under which delay in presentment of the defendant to a magistrate judge may alone justify a finding of involuntariness. But this argument is contrary to the language of § 3501(c), which makes plain that the six-hour time limitation of § 3501(c) applies only to statements that the court has determined are "voluntary." Thus, § 3501(c) does not address inadmissibility due to involuntariness, but instead, inadmissibility due to delay in presentment. If voluntariness were the sole criterion for admissibility, then § 3501(c) would be superfluous since voluntary confessions would by definition be admissible, regardless of whether they were taken within or outside the six-hour safe harbor. This Court should grant the petition so as to resolve the well-settled circuit split on

this issue and to make clear that § 3501 should not to be interpreted in a manner that renders the six-hour time limitation in subsection (c) meaningless.

The United States also argues that the circuit split on this issue of statutory interpretation does not merit this Court's review in light of the number of cases that have raised this issue in recent years. But the United States overlooks the fact that this issue is an important one affecting every federal case in which there is a confession taken after arrest and before presentment. A confession may be by far the most important evidence in a case. Both law enforcement and the courts need to know whether § 3501(c) establishes a bright-line rule regarding delay beyond the six-hour time period, or if instead admissibility of a confession depends only on voluntariness. Mr. Corley's case is an ideal vehicle for resolving the circuit split on this issue since his confession was the only evidence linking him to the robbery, and the delay in presentment was principally for the purpose of securing a confession and was therefore unreasonable. This case thus neatly illustrates the different results that flow from the different interpretations of the statute.

1. Section 3501(c) is superfluous unless it is interpreted to mean that voluntary confessions taken outside the six-hour time limitation are inadmissible if there was unreasonable delay in presentment.

Section 3501(c) provides that a confession "shall not be inadmissible solely because of delay" in presentment "if such confession is found by the trial judge to have been made voluntarily and . . . given . . . within six hours" of arrest. 18 U.S.C. § 3501(c). This "time limitation" does not apply if the delay in presentment beyond six hours is "found to be reasonable" in view of available transportation and the distance to the magistrate. *Id.* Subsection (c) thus eliminates unreasonable delay in presentment as a basis for suppression as

long as the confession is given within six hours of arrest. In other words, it creates a six-hour exception to the *McNabb-Mallory* rule that post-arrest confessions taken before presentment should be suppressed if there was unreasonable delay in presentment. *See McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957); Fed. R. Crim. P. Rule 5(a).

The United States's argument that voluntariness is the sole criterion for admissibility under § 3501(a) renders subsection (c) superfluous. *See* Brief in Opp. at 9. Since the confessions covered by the six-hour safe harbor in subsection (c) are by definition "made voluntarily," this six-hour time limitation would make no difference if the United States were correct – such voluntary statements would be admissible even if given outside the six-hour time period. The United States tries to breath significance into subsection (c) by arguing that under this subsection, if the confession occurs outside the six-hour safe harbor of § 3501(c), "delay in presentment may in some circumstances justify a finding of involuntariness, either alone (in cases where the delay is extraordinarily long and oppressive) or in conjunction with other factors set forth in Section 3501(b)." Brief in Opp. at 11. But the language of the statute cannot support this strained interpretation. Section 3501(c) uses the word "inadmissible," not the word "involuntary," as would be required for the United States's interpretation – "a confession . . . shall not be *inadmissible* solely because of delay . . ." The six-hour time limitation, moreover, only applies to confessions "found by the trial judge to have been made voluntarily." § 3501(c). The statute thus clearly anticipates that *voluntary* confessions falling outside the six-hour time limitation will be "inadmissible" under the *McNabb-Mallory* rule if there was unreasonable delay

in presentment.[1] This Court should grant the writ so as to make clear that § 3501(c) should be interpreted so as not to render it superfluous.

2. The Circuit split regarding the interpretation of § 3501(c) is an important one that requires resolution by this Court.

As the United States acknowledges, the circuit split on the issue presented here is genuine and well-settled. This Court previously found the issue worthy of certiorari in *United States v. Alvarez-Sanchez*, 511 U.S. 350 (1994), but did not reach it only because the Court resolved the case on a separate threshold issue. *Id.* at 356; Brief in Opp. at 12-15. The United States argues, however, that the number of cases addressing § 3501(c) since *Alvarez-Sanchez* suggests that the issue presented here "does not arise with great frequency" and therefore does not warrant review. Brief in Opp. at 17-18.

The number of cases addressing this issue cited in the United States's brief, Mr. Corley's petition, and the Third Circuit's opinion, however, is hardly insignificant and demonstrates that this vexing issue continues to trouble the courts. Brief in Opp. at 12-17; Pet. 13-15; *United States v. Corley*, 500 F.3d 210, 216-19 (3d Cir. 2007). These reported cases, moreover, hardly represent the universe of cases in which the issue has arisen and been decided in the district

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[1] At oral argument in *United States v. Alvarez-Sanchez*, 511 U.S.350 (1994), in which this Court considered but ultimately did not resolve the issue presented here, the United States conceded that its interpretation would require rewriting § 3501(c) at least by adding the word "otherwise," evidently before the word "voluntarily." Transcript of Oral Argument, 1994 WL 665079 p. 8 (March 1, 1994) ("[I]n order to make it fit better with the balance of the statute, what we do, quite candidly, is to read subsection (c) as if it said, and it otherwise can be --"). To support the United States's interpretation, however, subsection (c) would have to be rewritten still further. Subsection (c) would have to provide that a confession made after arrest "shall not be *deemed involuntary* solely because of delay . . . if such confession is found by the trial judge to have been made *otherwise* voluntarily and . . . if such confession was . . . given by such person within six hours" of arrest. § 3501(c) (italics indicating substituted or added words).

courts, since many such pre-trial rulings on motions to suppress evidence do not result in written or reported opinions. Also, instead of appealing the issue, many defendants in such cases negotiate guilty pleas, and as a result the issue is not brought to the circuits.

The United States fails to recognize, moreover, the critical role confessions play in criminal cases and the unsurpassed importance attached to them by judges and jurors. *See Miranda v. Arizona*, 384 U.S. 436, 442 (1966) ("[A]dmissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, . . ."). In light of this critical role, it is especially important that both federal law enforcement and the courts have a consistent and clear interpretation of § 3501(c). *See Corley*, 500 F.3d at 229 (Sloviter, J., dissenting) (observing that the interpretation of § 3501(c) "is important not only to Corley, but to all arresting officers operating in this circuit"). In any case in which a confession is secured following arrest but before presentment, law enforcement and the courts need to know whether delay alone past the six-hour time limit can be a basis for finding the confession inadmissible, or whether admissibility depends only on the difficult to define concept of voluntariness. As this Court has noted, the multi-factor voluntariness test codified in § 3501(b) is difficult "for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Dickerson v. United States*, 530 U.S. 428, 444 (2000). And as *amicus* accurately observes, having a bright-line six-hour rule regarding the length of permissible delay "'conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness.'" Brief of National Association of Criminal Defense Lawyers as *Amicus* in Support of Petitioner, at 5 (quoting *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990)).

The United States also suggests in passing that the requirement of *Miranda* warnings "largely protect[s] against the abuses at which *McNabb* and *Mallory* were originally aimed." Brief in Opp. at 18. But *Miranda* warnings do nothing to protect against delay in presenting the defendant to a neutral magistrate. Rather, the opposite is true – delay in presentment vitiates the value of *Miranda* warnings by serving as a tool for their circumvention. The longer the delay, the more likely the defendant will feel pressured to waive *Miranda*. *See Corley*, 500 F.3d at 218 ("[T]he longer the delay continues, the more likely it becomes that the arrested person will feel improper pressure to confess."); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 247 (1973) ("[T]he nature of custodial surroundings produce an inherently coercive situation."). And a defendant could well believe that the assertion of any rights under *Miranda* would seem uncooperative and would only result in a further delay of the appearance before a neutral magistrate. Thus, the *McNabb-Mallory* rule, rather than duplicating the protection afforded by *Miranda*, is in fact a necessary complement to *Miranda* that prevents unreasonable delay from vitiating the very rights *Miranda* protects.

The United States argues in addition that the Third Circuit did not determine whether this was a case in which application of the bright-line six-hour rule would have even made a difference. Brief in Opp. at 18. The United States is incorrect. The Third Circuit found it necessary to address this difficult issue of statutory interpretation precisely because its interpretation made all the difference in the outcome. As the Circuit stated, "Because we believe that the first contention [that the confessions were inadmissible under § 3501(c)] is governed by our decision in *Government of Virgin Islands v. Gereau*, 502 F.2d 914 (3d Cir. 1974), and we discern no error in the District Court's determination that Corley's confessions were voluntary,

the delay in presenting [Mr. Corley] to a federal magistrate judge beyond that provided by 18 U.S.C. § 3501(c) will not result in suppressing his confessions." *Corley*, 500 F.3d at 212 (emphasis added).

It was undisputed in Mr. Corley's case that his written confession, taken over 26 hours after his arrest, was well outside the six-hour time limit of § 3501(c), and the majority noted that the district court's conclusion that the oral confession was within the six-hour time limit "is contrary to the text of the statute." *Id.* at 220 n.7. Thus, the majority found that both confessions were outside the time-limit. The majority also did not disagree with the dissent's conclusion that "apparently the only reason[] for the delay following Corley's hospital discharge" was that the officers "wanted to question him about his participation in this bank robbery. . . ." *Id.* at 237 (Sloviter, J. dissenting). Since, as the majority stated, the "paradigm of 'unnecessary delay' is when it is solely for the purpose of eliciting a confession," *id.* at 214, it is plain that the majority would have ordered suppression of the confessions had it adopted the interpretation of § 3501(c) urged by the dissent and Mr. Corley – that statements taken outside the six-hour safe harbor are inadmissible if there was unnecessary delay in presentment.

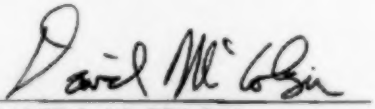
In conclusion, certiorari is warranted to resolve a well-settled circuit split over the interpretation of an important federal statute that controls the admissibility of the most damning of evidence – confessions. The circuit split is entrenched, and there is no likelihood that the circuits will resolve their opposing interpretations without this Court's intervention. This case presents the perfect vehicle for resolving the split because, although Mr. Corley's confessions were voluntary, they were plainly outside the six-hour time limit of § 3501(c) and Mr. Corley's presentment was unnecessarily delayed. The facts thus illuminate well the dueling

interpretations of § 3501, and the interpretation that is applied determines the outcome of the case. The courts and federal law enforcement need this important criminal justice issue resolved, and this is an ideal case for resolving it.

CONCLUSION

For the foregoing reasons, petitioner, Johnnie Corley, requests that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

Respectfully submitted,



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REPLY BRIEF

No. 07-10441

In The Supreme Court of the United States

JOHNNIE CORLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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ARGUMENT

A. 18 U.S.C. § 3501(c) and the *McNabb-Mallory*[1] rule required suppression of Mr. Corley's confessions.

The government maintains that 18 U.S.C. § 3501 establishes voluntariness as the sole criterion for the admissibility of confessions, and that subsection (c) is nothing more than a voluntariness "safe harbor." Gov't Br. 7-8. It rejects the notion that subsection (c) retains a limited form of the *McNabb-Mallory* rule as resting on an unsustainable "negative implication" from the text; claims any surplusage occasioned by its own interpretation of § 3501 is tolerable; and argues that its rewriting of § 3501(c) to avoid that surplusage is minor and consistent with congressional intent. *Id.* at 8-9.

None of these contentions has merit. Congress's intent to preserve the *McNabb-Mallory* rule for confessions taken more than six hours after arrest is evident from § 3501(c)'s text, and need not be inferred by negative implication. Any other interpretation of § 3501 renders subsection (c) a nullity, a result the government can avoid only by rewriting subsection (c) in a way that fundamentally alters its text and meaning.

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[1] *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

1. Section 3501(c) retains the *McNabb-Mallory* rule outside the six-hour time limitation.

Mr. Corley does not argue, as the government suggests, that § 3501(c) creates a rule of inadmissibility simply by "negative implication." Gov't Br. 17-18. Rather, the text of subsection (c), when properly read in light of the existing *McNabb-Mallory* rule, establishes that Congress intended in § 3501(c) to preserve the rule in general, but to carve out from its application confessions made within six hours of arrest. Pet. Br. 24. Confessions made outside that six-hour time limitation are therefore inadmissible if, under the *McNabb-Mallory* rule, the defendant's presentment to the magistrate judge was unnecessarily delayed.[2]

As the government concedes, § 3501(c) was intended to address the *McNabb-Mallory* rule. Gov't Br. 8, 13. It must therefore be interpreted in light of that rule, not in a vacuum. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979). The *McNabb-Mallory* rule, as precisely captured by the text of subsection

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[2] The six-hour "time limitation" in subsection (c) may be extended under the subsection's proviso to the extent found "reasonable" by the trial judge "considering the means of transportation and the distance to be traveled" to the nearest magistrate judge. 18 U.S.C. § 3501(c). Throughout this brief, all references to the time limitation are intended also to include any extensions allowed under the proviso.

(c), makes confessions "inadmissible solely because of delay in bringing such person before a magistrate judge." 18 U.S.C. § 3501(c). Subsection (c) then states that confessions "shall not" be "inadmissible solely because of delay" – *i.e.*, that the *McNabb-Mallory* rule shall not apply – if two conditions are met: "if such confession [was] . . . made voluntarily . . . *and* if such confession was made . . . within six hours immediately following his arrest." *Id.* (emphasis added).

The government simply ignores these conditions when it quotes § 3501(c) and claims that it is a "rule of inclusion." Gov't Br. 15-16. At most, subsection (c) is a *conditional* rule of inclusion, and given the backdrop *McNabb-Mallory* rule, that makes all the difference. Had Congress intended voluntariness to be the sole criterion for admissibility for purposes of subsection (c), it never would have added the six-hour provision. Indeed, that was how § 3501(c) read before it was amended on the Senate floor. Pet. Br. 39-40.

The very purpose of the time limitation, then, was statutorily to retain the *McNabb-Mallory* rule outside that time period. Thus, the addition of the six-hour provision – and its inclusion together with a separate criterion of voluntariness – is an affirmative, textual indication of Congress's intent to preserve a limited version of the *McNabb-Mallory* rule.[3] Section 3501(c) simply makes no sense without

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[3] The government's point that Congress elsewhere has been clearer in adopting exclusionary rules, Gov't Br. 16, is misplaced

(Continued on following page)

the rule applying to confessions taken more than six hours after arrest.

Once it is understood that § 3501(c) does not create a rule of inadmissibility merely by negative implication, the government's objections fall away. There are no "untenable consequences" or "nonsensical results" in the form of delay being permitted only for transportation under § 3501(c)'s proviso. Gov't Br. 19-20. Once the six-hour time limitation has expired, the standard justifications for delay under the *McNabb-Mallory* rule continue to apply. Nor does Mr. Corley apply a negative-implication analysis "arbitrarily," *id.* at 20 – rather, he draws no negative implication at all. Finally, there is no "interpretive problem" for the courts, *id.*; they have been determining the reasonableness and necessity of delay under the *McNabb-Mallory* rule for sixty-five years. In doing so, the courts have been consistent and clear that delay for the purpose of interrogation, as occurred in this case, is the quintessential example of "unnecessary delay."[4]

– none of the cited statutes involves a situation in which Congress was expressly addressing an *existing exclusionary rule*.

[4] *See, e.g.*, *Mallory*, 354 U.S. at 455 (delay in presentment "must not be of a nature to give opportunity for extraction of a confession"); *United States v. Wilson*, 838 F.2d 1081, 1085 (9th Cir. 1988) ("[D]esire of the officers to complete the interrogation is, perhaps, the most unreasonable excuse possible under § 3501(c).").

2. Reading § 3501 to make voluntariness the sole criterion for the admissibility of confessions renders subsection (c) unacceptably superfluous.

The government contends that § 3501(a) makes voluntariness "the sole test for the admissibility of confessions."[5] Gov't Br. 23. As demonstrated in Mr. Corley's opening brief, this interpretation renders subsection (c) entirely superfluous. Pet. Br. 28-30. The government's first response is to argue that "a degree of surplusage" in a statute may be tolerated in order to avoid adopting a "'textually dubious construction.'" Gov't Br. 22 (quoting *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331, 2337 (2007)). But the government's interpretation does not merely render some terms "surplusage" in the sense of rendering them harmlessly redundant.[6] Instead, like the interpretation this Court rejected in *Atlantic Research Corp.*, it renders an entire provision —

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[5] The government stops short of asserting that subsection (a) itself was intended to abrogate the *McNabb-Mallory* rule, but that is essentially the government's position. Such a contention is refuted by the legislative history, Pet. Br. 52-55, a point the government never addresses. "A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989). Given the legislative history, the government cannot possibly show that subsection (a) itself abrogates the *McNabb-Mallory* rule.

[6] *See, e.g., Lamie v. Trustee*, 540 U.S. 526, 536 (2004) (reading word "attorney" in bankruptcy statute as harmless surplusage since statute's "reference to professional persons undoubtedly includes attorneys").

§ 3501(c) – "a dead letter" and "a nullity." 127 S. Ct. at 2337. The government's interpretation must therefore be rejected.

Furthermore, there is nothing "textually dubious" in construing § 3501(c) as retaining a limited *McNabb-Mallory* rule. To the contrary, as discussed above, it is the only plausible interpretation of the text in light of the backdrop against which Congress was legislating. Moreover, as this Court has explained, § 3501(a) was intended to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966). *See Dickerson v. United States*, 530 U.S. 428, 436 (2000). There is no basis in the text of subsection (a) to conclude that its general statement that "a confession shall be admissible . . . if it is voluntarily given" was intended also to overrule *McNabb* and *Mallory*, especially since subsection (c), by contrast, contains language specifically referring to the *McNabb-Mallory* rule.

3. The government's rewriting of § 3501(c) to avoid surplusage fundamentally changes the subsection from a provision addressing the *McNabb-Mallory* rule to a putative voluntariness safe harbor.

The government does not dispute that in order to avoid rendering § 3501(c) surplusage, it must rewrite

the subsection by substituting the word "involuntary" for "inadmissible" and adding the word "otherwise" before "voluntarily."[7] Gov't Br. 23. It is only through this rewriting that the government can characterize subsection (c) as a voluntariness safe harbor. Without the substitution and addition of words, subsections (a)-(b) and (c) relate to different things – (a) and (b) to voluntariness, and (c) to the *McNabb-Mallory* rule.

The government's insistence that its rewrite is minor and implied by the text is fundamentally incorrect. A side-by-side comparison of the statute as written by Congress, and as rewritten by the government, makes clear that the government's changes are significant and completely alter the statute's meaning:

Subsection (c)	Government's rewrite
[A] confession . . . shall not be *inadmissible* solely because of delay [in presentment] . . . if such confession is found by the trial judge to have been made *voluntarily* and . . . if . . . made . . . within six hours [of arrest].	[A] confession . . . shall not be *involuntary* solely because of delay [in presentment] . . . if such confession is found by the trial judge to have been made *otherwise voluntarily* and . . . if . . . made . . . within six hours [of arrest].

[7] The Third Circuit's interpretation of the statute required the same statutory rewriting: "Subsection (c) instructs courts that they may not find a confession involuntary 'solely' because of the length of presentment delay where the confession is *otherwise* voluntary and where the delay is less than six hours (or longer than six hours but explained by transportation difficulties)." J.A. 191.

"The short answer [to this argument] is that Congress did not write the statute that way." *Russello v. United States*, 464 U.S. 16, 23 (1983). Congress, having used the terms "inadmissible" and "voluntarily" in the same sentence, clearly understood that admissibility and voluntariness are distinct legal concepts. "The use of different words or terms within a statute demonstrates that the legislature intended to convey different meaning for those words." 3A Norman J. Singer, Sutherland Statutes and Statutory Construction § 71:3 (rev. 6th ed. 2000); *see also Russello*, 464 U.S. at 23 ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftmanship."). Likewise, courts "are not free, under the guise of construction, to amend [ ] statute[s] by inserting [words] therein." *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 199 (1952).

The government argues that "inadmissible" is "virtually synonymous" with "involuntary" by virtue of subsection (a)'s general provision that a confession "shall be admissible in evidence if it is voluntarily given." Gov't Br. 23. The text of subsection (c), however, precludes equating "inadmissible" and "involuntary." As discussed above, subsection (c) provides *two* criteria for the admissibility of a confession: "hav[ing] been made voluntarily *and* . . . within six hours" of arrest. 18 U.S.C. § 3501(c) (emphasis added); *see also* J.A. 234 (Sloviter, J., dissenting) ("[T]he majority completely overlooks the significance of the statutory

'and' in subsection (c)."). Because voluntariness is only one criterion for admissibility under subsection (c), "inadmissible" and "involuntary" are plainly not synonymous under the statute.

Under the *McNabb-Mallory* rule, moreover, "inadmissible" and "involuntary" are different concepts. *McNabb* and *Mallory* did not hold that delay rendered the confessions in those cases *involuntary*, but instead, that it rendered them *inadmissible*. *McNabb*, 318 U.S. at 340-42; *Mallory*, 354 U.S. at 455. The Court after *McNabb* made clear that the rule renders *voluntary* confessions inadmissible. *Upshaw v. United States*, 335 U.S. 410, 413 (1948); *see also Dickerson*, 530 U.S. at 442-44 (holding voluntary confessions inadmissible if taken in violation of *Miranda*). Congress thus chose the phrase "inadmissible solely because of delay" precisely because it refers to *McNabb-Mallory* rule. To change the term "inadmissible" to "involuntary," and to add the word "otherwise" before the word "voluntarily," eviscerates the reference to the *McNabb-Mallory* rule and replaces it with what the government would prefer to see in § 3501(c) – a voluntariness safe harbor. Because the government's rewriting of the statute fundamentally changes the meaning of subsection (c), it must be rejected.

B. The government's interpretation of § 3501(c) either is constitutionally doubtful, or renders the subsection redundant of the voluntariness requirement and therefore superfluous.

The government agrees that Congress "can neither direct the courts to admit confessions the courts find to be involuntary, nor accomplish the same thing by narrowing the factual grounds for determining involuntariness." Gov't Br. 38-39 (quoting Pet. Br. 36). Thus, the government concedes that its interpretation of § 3501(c) – as precluding a finding that a confession taken within six hours of arrest is *involuntary* (as opposed to merely inadmissible) due solely to delay, Gov't Br. 23 – would be unconstitutional if in fact it were to cause a court to admit a confession it otherwise would find involuntary.

To avoid this constitutional problem, the government posits that no confession made within six hours of arrest "could ever be deemed involuntary in a constitutional sense based 'solely' on the fact of the delay in presentment." Gov't Br. 39. But that solution, even if it were to alleviate the constitutional doubt, creates a separate problem: it interprets subsection (c) as applying to a null set of cases, and thus as being superfluous. If there is no conceivable case in which a court could validly determine a confession taken within six hours of arrest to be involuntary based solely on delay, then subsection (c) will never have any application under the government's interpretation – all voluntary confessions will be admissible

under subsection (a). While the government suggests this might be a permissible "belt-and-suspenders approach," Gov't Br. 9, its interpretation effectively reduces subsection (c) to a nullity, and therefore should be rejected.

C. Federal Rule of Evidence 402 does not require admission of Mr. Corley's confessions.

The government argues that, to the extent the *McNabb-Mallory* rule as limited by § 3501(c) is a vestigial supervisory-power rule rather than a rule sanctioned by Congress, it is superseded by Federal Rule of Evidence 402. Gov't Br. 26-30. Under this theory (which was never raised or briefed below), Rule 402's general provision that all relevant evidence is admissible "eliminates *McNabb-Mallory* as an evidentiary doctrine," *id.* at 30, because this Court has no power to prescribe a supervisory rule inconsistent with an Act of Congress. *Id.* at 27-29.

The government's argument fails on two levels. First, even if it were true that Rule 402 abolished the Court's supervisory power to exclude evidence, the pertinent Advisory Committee Note on Rule 402 expressly provides that the *McNabb-Mallory* rule is an exception to Rule 402's general rule of admissibility. The government has previously conceded as much before this Court, and should not now be heard to argue otherwise. Second, Rule 402 in fact leaves the Court's supervisory power fully intact. The Rule's exception for "rules prescribed by the Supreme Court

pursuant to statutory authority" was intended not to limit the supervisory power, but to preclude future use of the then-extant Rules Enabling Acts to prescribe or amend rules of evidence. The Court has previously declined to credit the government's argument that Rule 402 abolished the supervisory power to exclude evidence, and it should not change course here.

1. Rule 402 preserves the *McNabb-Mallory* rule.

Rule 402 as originally proposed provided for the admissibility of relevant evidence "except as otherwise provided by," *inter alia*, an "Act of Congress" or "rules adopted by the Supreme Court." *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 216 (U.S. 1972). The Advisory Committee Note[8] on the proposed Rule sets forth several

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[8] The Advisory Committee Notes on the Federal Rules of Evidence are an authoritative source for determining the meaning of the Rules, particularly where the rule in question became effective as proposed. *Tome v. United States*, 513 U.S. 150, 160-63 (1995) ("We have relied on those well-considered Notes as a useful guide in ascertaining the meaning of the Rules."). The Notes were transmitted along with the Rules to this Court prior to the promulgation of the Rules in November 1972, and to Congress prior to the enactment of the Rules in January 1975. H. Rep. No. 93-650, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 7075, 7077 (1973). While Rule 402 was amended between proposal and enactment, that amendment had no bearing on the issue of the *McNabb-Mallory* rule's preservation, as discussed in text.

exceptions to this general rule of admissibility. Advisory Committee Note on 1972 Proposed Rule 402 ("1972 Note"). One of those enumerated exceptions is the *McNabb-Mallory* rule. *Id.* The Advisory Committee explained that the *McNabb-Mallory* rule falls under Rule 402's exceptions for statute- and rule-based exclusion, because it implements and enforces the (originally statutory, now Rule of Criminal Procedure 5(a)-based) requirement of prompt presentment, and is in fact called for by § 3501(c):

> The Rules of . . . Criminal Procedure in some instances require the exclusion of relevant evidence. For example, * * * the effective enforcement of the command, originally statutory and now found in Rule 5(a) of the Rules of Criminal Procedure, that an arrested person be taken without unnecessary delay before a commissioner or other similar officer is held to require the exclusion of statements elicited during detention in violation thereof. *Mallory v. United States*, 354 U.S. 449 . . . (1957); 18 U.S.C. § 3501(c).

Id.

The Advisory Committee thus made clear that Rule 402's statute and rule exceptions were intended to cover not just statutes or rules that expressly exclude evidence, but also judicial rulings that enforce or implement statutes or statutorily-authorized

rules.[9] *Accord* 22 Charles Alan Wright, Federal Practice and Procedure § 5198 (2d ed. 1982) ("Often the exclusionary effect [for purposes of Rule 402] is explicit, but in some cases it is only implied."). And plainly, the Advisory Committee did not view Rule 402 as abrogating the *McNabb-Mallory* rule; the Committee drafted the Rule with the express intent to preserve it through the Rule's exceptions for statute- and rule-based exclusion.

The government has previously conceded before this Court that Rule 402 – as enacted – preserves the *McNabb-Mallory* rule. In its brief in *United States v. Payner*, 447 U.S. 727 (1980), the government acknowledged that the *McNabb-Mallory* rule falls within Rule 402's statute exception because it excludes evidence "as a method of implementing . . . a federal statute or a statutorily authorized rule":

> Rule 402 itself necessarily contemplates a substantial degree of judicial latitude in deciding whether relevant evidence should be suppressed in particular cases. The Rule stops far short of identifying specifically every set of circumstances in which suppression of relevant evidence is permissible or required. Rather, the drafters left to the courts the numerous difficult and often dispositive

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[9] The government's point that *McNabb* itself recognized that Congress had not explicitly forbidden use of the evidence in that case therefore has no bearing under Rule 402. Gov't Br. 42 n.18.

questions concerning the propriety of excluding relevant evidence *as a method of implementing the Constitution, a federal statute, or a statutorily authorized rule.*[FN13]

[FN13] The Advisory Committee's Note to Rule 402 (56 F.R.D. at 216-218 (1972)) demonstrates that *the drafters expected the courts to decide when the effective enforcement of a particular constitutional provision, statute, or rule requires the suppression of relevant evidence. As examples of the kinds of judicial rulings the drafters intended to permit,* the Note cites *Mallory v. United States*, 354 U.S. 449 (1957) (implementing Fed. R. Crim. P. 5(a)'s prohibition of "unnecessary delay" between arrest and arraignment by suppressing a confession obtained during such delay). . . .

Brief for the United States in *United States v. Payner*, No. 78-1729, *available at* 1979 WL 213843, at *32 & n.13 (Nov. 30, 1979) (emphasis added).

But here, the government overlooks the Advisory Committee Note's dispositive impact, and never mentions the Note in its Rule 402 argument. Gov't Br. 26-30. It does cite the Note in a footnote elsewhere in its brief, and baldly states that the Note, in referring to the *McNabb-Mallory* rule, "does not purport to be an interpretation of [Rule 402] itself" but "simply

restates the conclusion of this Court in *Mallory*." Gov't Br. 42 n.18. That makes little sense. The relevant portion of the Note begins with the statement, "Not all relevant evidence is admissible," then proceeds to discuss various bases for exclusion, including the *McNabb-Mallory* rule. 1972 Note. The only plausible reading of the Note is the one the government gave it in *Payner*: the *McNabb-Mallory* rule is an "example[ ] of the kinds of judicial rulings the drafters intended to permit" under Rule 402. 1979 WL 213843, at *32 n.13.

2. Rule 402 did not abolish the Court's supervisory power to exclude evidence.

Although it never says so specifically, the government apparently relies on the language in Rule 402 providing an exception to the general rule of admissibility for rules prescribed by this Court "pursuant to statutory authority" to ground its claim that Rule 402 abolished the Court's supervisory power to exclude evidence. Gov't Br. 29. Again, even if the government were right in that regard, the *McNabb-Mallory* rule would still be preserved because – within the meaning of Rule 402 – the rule is based in statute and statutorily-authorized rule (§ 3501(c) and Rule 5(a)). But the government's abolition contention is wrong, too.

As discussed above, the original wording of Rule 402 made exception for "rules adopted by the Supreme Court." Advisory Committee Note on 1974

Enactment of Rule 402 ("1974 Note"). That wording was thought to create an ambiguity as to whether the then-extant Rules Enabling Acts gave this Court authority to promulgate rules of evidence, however, so Congress changed the language to the as-enacted "rules prescribed by the Supreme Court pursuant to statutory authority."[10] H. Rep. No. 93-650, *supra* n.8, at 7081, 7091. This change was made not only in Rule 402, but everywhere the objectionable language appeared in the Rules.[11] Given its narrow purpose, this pre-enactment amendment has been described by the leading commentator as non-substantive and "more symbolic than real." 22 Charles Alan Wright, Federal Practice and Procedure §§ 5191, 5198.

The use in Rule 402 of the words "pursuant to statutory authority" was therefore not intended to affect this Court's supervisory power, and the government has previously failed to persuade the Court

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[10] Specifically, Congress did not want to "acquiesce in the Court's judgment" that it had the authority to promulgate the Rules of Evidence, and did not want to sanction the use of the Rules Enabling Acts to amend or add to the Rules in the future. 1974 Note; H. Rep. No. 93-650, *supra* n.8, at 7081, 7091. Instead, Congress provided a new mechanism for future additions or amendments to the Rules in the statute creating the Rules of Evidence, a mechanism providing a greater role for Congress in the rule-making process. *See id.* at 7091.

[11] 1974 Note. Changes were thus made to promulgated Rules 501, 802, 901(b)(10), 902(4), and 1101(c), as well. *Compare* 56 F.R.D. at 230, 299, 332, 337, 348 *with* Fed. R. Evid. 501, 802, 901(b)(10), 902(4), 1101(c).

otherwise.[12] The government strenuously pressed the abolition argument in *Payner*, 1979 WL 213843, at *10-34, where the Court rejected it *sub silentio* – citing *McNabb* itself to reaffirm that "[f]ederal courts may use their supervisory power in some circumstances to exclude evidence taken from the defendant by 'willful disobedience of law.'"[13] 447 U.S. at 735 n.7 (quoting *McNabb*, 318 U.S. at 345) (italics omitted). While the Court reversed the suppression of evidence in that case on other grounds, 447 U.S. at 735-37, it emphasized that "our decision today does not limit the traditional scope of the supervisory power in any

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[12] The argument was apparently first made to – and rejected by – the Second Circuit Court of Appeals in *United States v. Jacobs*, 547 F.2d 772, 777 (2d Cir. 1976), *cert. dismissed as improvidently granted*, 436 U.S. 31 (1978). The government next raised the issue in *United States v. Caceres*, 440 U.S. 741 (1979), where this Court declined to exercise its supervisory power to exclude evidence "without pausing to evaluate the Government's challenge to our power to do so." *Id.* at 755 & n.22. *Payner* was briefed and decided the following term. It appears that the abolition argument has lain dormant until its revival by the government in this case.

[13] The *Payner* majority's rejection of the Rule 402 argument was echoed, expressly, by the three dissenting Justices in that case. 447 U.S. at 751 n.17 (Marshall, J., dissenting) ("The Government argues that Rule 402 of the Federal Rules of Evidence stripped the federal judiciary of its supervisory powers to exclude evidence obtained through gross misconduct by agents of the United States. * * * The Court does not address the issue. I would merely note that the Government's discussion of the legislative history behind Rule 402 fails to convince me that it was Congress' intent to attempt such a radical curtailment of the long-established supervisory powers of the federal judiciary.").

way." *Id.* at 736 n.8. *Payner* therefore effectively disposes of the government's argument that Rule 402 abolished the Court's supervisory power to exclude evidence.

D. The government fails to address the central elements of § 3501's legislative history.

Rarely does legislative history of the most persuasive type so clearly confirm a statute's meaning. Here, the floor manager of § 3501 laid bare the section's parallel structure by dividing its anti-*Miranda* and anti-*McNabb-Mallory* parts so they could be voted on separately; won retention of the *McNabb-Mallory* provision by promising to consider its subsequent amendment; and eventually agreed to that amendment, which represented – in his words – a "concession" on the original proposal of complete abrogation. 114 Cong. Rec. 14,185 (1968); Pet. Br. 46-49, 53-55. This is not "murky, ambiguous, and contradictory" legislative history susceptible to "strategic manipulations" by legislators or lobbyists. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Rather, it is clear confirmation – taken from the heart of the congressional debate – that § 3501(c) alone addresses the *McNabb-Mallory* rule, and retains it for confessions taken more than six hours after arrest.

The government addresses none of these central elements of the legislative history.[14] Instead, it misinterprets certain tangential remarks of Senator Scott while discounting his clear statement of his amendment's purpose; impugns reference to the D.C. Crime Act as "double legislative hearsay," Gov't Br. 10; and relies on legislative history of the type eschewed by the Court as unreliable in *Exxon Mobil* and other cases. The government's arguments are unpersuasive.

The government tries to downplay the Scott Amendment by citing Senator Scott's description of it as "simple," uncontroversial, and addressed to preserving § 3501(c)'s constitutionality. Gov't Br. 34; 114 Cong. Rec. 14,184, 14,185-86. This, the government maintains, shows that Senator Scott did not view his amendment as changing the "essential character of the bill." Gov't Br. 34. But the government fails to appreciate *how* the amendment addressed concerns over § 3501(c)'s constitutionality. In Senator Scott's own words, it did so by "provid[ing] that the period during which confessions may be received . . . shall in no case exceed 6 hours" – in other words, by restoring

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[14] The government acknowledges Mr. Corley's "vote-structuring" argument, Gov't Br. 34, then promptly ignores it. And there is no acknowledgment, even, of the floor manager's view that the Scott Amendment represented a "concession" on complete abrogation – a mere "modification" of the *McNabb-Mallory* rule to which he could agree only after "adjust[ing his] own thinking" in light of the "differences of opinion about this matter." 114 Cong. Rec. 14,173, 14,185 (remarks of Sen. McClellan).

the *McNabb-Mallory* rule for confessions taken after that period.[15] 114 Cong. Rec. 14,184. The simplicity and agreeability of the Scott Amendment owed not to a failure to make any real change to proposed § 3501(c), but to the fact that essentially the same compromise on the *McNabb-Mallory* rule had been struck only five months earlier by the same Congress in the D.C. Crime Act – by a lopsided vote of 67-9 in the Senate and by unanimous consent in the House. 113 Cong. Rec. 36,078-79, 36,409 (1967).

The government's attempt to render the D.C. Crime Act irrelevant to the interpretation of § 3501(c) must fail. The government baldly states that the Act

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[15] The government disregards these remarks – made by Senator Scott in introducing his amendment – as having "no basis in the statutory text." Gov't Br. 35 n.16. But Senator Scott's statement of his amendment's meaning is entitled to substantial weight. *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). The link between constitutionality concerns and the partial restoration of the *McNabb-Mallory* rule was made again by Senator Scott, immediately after Senator McClellan correctly described the amendment as a "concession" on complete abrogation:

> I am trying, here, to avoid having section 3501(c) . . . declared unconstitutional *by eliminating its open-endedness in its present form.* [The amendment] is a way out of this problem; but we could extend the time to a point where we endanger the likelihood of having it remain on the statute books. Therefore, [Senator McClellan] and I have agreed on a period twice as long as that which title III of the [D.C. Crime Act] stipulated for the District of Columbia.

114 Cong. Rec. 14,185 (emphasis added).

did not preserve the *McNabb-Mallory* rule for confessions taken more than three hours after arrest. Gov't Br. 35. Such a reading, however, is precluded not only by the Act's legislative history, Pet. Br. 43-44 & n.13, but by an even more important indicator for present purposes: the understanding of the senators debating § 3501(c).[16]

During debate on § 3501(c), Senator Bible – the floor manager of the D.C. Crime Act and a crafter of § 3501(c) – described the D.C. Act as taking only a "first step" toward abrogating the *McNabb-Mallory* rule in the District of Columbia. 114 Cong. Rec. 14,133. Senator McClellan explained that the D.C. Act only "revised" the rule, *id.* at 13,848, and Senator Fong noted that the Act "did not . . . repeal *Mallory* completely," *id.* at 12,293, 14,136. No senator remarked differently. It was under *that* understanding of the D.C. Crime Act that the Scott Amendment was proposed and agreed to as a "concession" on complete abrogation and a mere "modification" of the

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[16] Normally, of course, little weight is given to the views of a later Congress on the interpretation of a prior Congress's enactments. *See, e.g., Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). But that maxim is inapplicable here. The issue is not what the D.C. Crime Act means, but what the Scott Amendment means. And given that the express purpose of the Scott Amendment was to "conform, as nearly as practicable," to the D.C. Act, 114 Cong. Rec. 14,184, senators' contemporaneous understanding of the D.C. Act is highly relevant. That understanding was likely highly accurate, as well, given that the D.C. Act was passed by the very same Congress debating § 3501(c).

McNabb-Mallory rule. *Id.* at 14,173, 14,185. Thus, even if resort to the legislative history of the D.C. Crime Act were inappropriate – which it is not – the government's claim that Mr. Corley's "compromise argument" depends entirely on that legislative history, Gov't Br. 35, is incorrect.

The government's only recourse in the legislative history is to the remarks of various representatives on the floor of the House after the bill had been returned to that chamber. Gov't Br. 37-38 & n.17. As discussed in Mr. Corley's opening brief, many of these remarks are ambiguous and contradictory, and all are from sources this Court has recognized as deserving relatively little weight.[17] Pet. Br. 50-51 & nn.19-20 (citing *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956)). As such,

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[17] Indeed, the remarks of Representative Celler, upon which the government principally relies, Gov't Br. 37, are particularly suspect. At least some representatives during the debate believed that Representative Celler (a staunch opponent of the bill) was engaged in a legislative maneuver that may have colored his remarks. 114 Cong. Rec. 16,069-70 (remarks of Rep. Colmer) (questioning Rep. Celler's request for referral to conference committee as a tactic to kill the bill); *id.* at 16,276 (remarks of Rep. Anderson) (same). This might well explain Representative Celler's inconsistent remarks regarding the effect of § 3501(c). *Compare id.* at 16,066 ("Title II would turn the clock backward to the day before *Mallory*. . . . ") *with id.* at 16,068 (§ 3501(c) provides a six-hour "time limit . . . during which interrogation may take place") (misattributed in government's brief, Gov't Br. 38 n.17). That is precisely the type of unreliable legislative history eschewed by the Court in *Exxon Mobil*, 545 U.S. at 568.

they cannot obscure the clear intent of Congress in enacting § 3501(c) as demonstrated by the persuasive legislative history that the government ignores.

Finally, it must be emphasized that the government's interpretation of § 3501 – that subsection (a) in effect abrogates the *McNabb-Mallory* rule and that subsection (c) is a voluntariness safe harbor – enjoys no support whatsoever in the legislative history. The government points to no instance in which a member of Congress spoke of subsection (a) and the *McNabb-Mallory* rule in the same breath, much less indicated that (a) eliminates the rule. Nor does the government muster even a single reference to subsection (c) as a voluntariness safe harbor. To the contrary, the legislative history conclusively demonstrates that subsections (a)-(b) and (c) are independent, parallel provisions and that (c) alone addresses the *McNabb-Mallory* rule by partially abrogating and partially retaining it. Pet. Br. 52-56.

E. The government's policy arguments do not provide any basis for disregarding the text of § 3501 and its legislative history.

As the government correctly states, this case must be decided on the basis of statutory interpretation and not on the basis of policy. Gov't Br. 40. The policy considerations merit discussion, however, so that the consequences for the courts and law enforcement of an interpretation either retaining the

McNabb-Mallory rule as codified in § 3501(c), or eliminating it altogether, are understood.

Congress, in deciding not to abrogate the *McNabb-Mallory* rule entirely, but instead to enact a six-hour compromise that retains a limited form of the rule, wisely chose to maintain this critical protection against the exploitation of presentment delay to obtain a confession. The government argues that this interpretation of § 3501 "carv[es] a sizeable . . . exception" out of the general admissibility of voluntary confessions. Gov't Br. 22. But, inconsistently, the government also argues there is no need for the rule because there have been very few confessions excluded on this basis in recent years, and "no demonstrated pattern" of violations of the right to prompt presentment. *Id.* at 41.

Neither of the government's positions is correct. The Second Circuit, in two decisions nine years apart, took note of exactly such a pattern of Rule 5(a) violations, "specifically warn[ing] the government about its continuing practice of unnecessarily delaying arraignments," and noting that if the government's "'indifference to Rule 5(a)'" continued, it would "'lead to the future exclusion of evidence.'" *United States v. Fullwood*, 86 F.3d 27, 32 (2d Cir. 1996) (quoting *United States v. Colon*, 835 F.2d 27, 31 (2d Cir. 1987)). The court made a point in *Fullwood* "to reiterate our concern as to the apparent indifference on the part of some in the government to taking arrested persons before a magistrate judge 'without unnecessary delay.'" *Id.* The Second Circuit has not found it necessary to

repeat its admonition since *Fullwood*, suggesting that the court's second warning – coming from a circuit that applies the modified *McNabb-Mallory* rule[18] – has been largely effective. Without "carving a sizeable exception" out of the general admissibility of voluntary confessions, the Second Circuit has addressed a pattern of violations of the right to prompt presentment.

Mr. Corley's case illustrates well the indifference to Rule 5(a) that law enforcement may have in a circuit that does not apply the modified *McNabb-Mallory* rule. The FBI agents here flagrantly disregarded the six-hour time limitation, first by holding Mr. Corley for nearly four hours in a local police station while they apparently continued their investigation, and later by purposefully delaying Mr. Corley's presentment in order to obtain his two confessions. The total delay was over twenty-nine hours. Without the *McNabb-Mallory* rule as codified in § 3501(c), these and other agents would have no incentive to act any differently in future cases. Under the government's interpretation, so long as the confession is voluntary, it is admissible, and thus the six-hour time limitation does not establish a bright-line rule and serves no deterrent purpose. The right to prompt presentment, under the government's interpretation, exists on paper only. The "practice of

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[18] *See United States v. Perez*, 733 F.2d 1026, 1035 (2d Cir. 1984) (holding that *McNabb-Mallory* rule applies outside § 3501(c)'s six-hour time limitation).

unnecessarily delaying" presentment that the Second Circuit twice observed, and that Mr. Corley's case illustrates, could then become increasingly common.

The government also states in passing that it "agrees with" the analysis of courts that have suggested that *Miranda* obviates the *McNabb-Mallory* rule, and that a defendant who is given *Miranda* warnings has no claim under *McNabb* and *Mallory* "on the theory that the *Miranda* warnings supply the words of caution that the Court found lacking in those cases." Gov't Br. 45 & n.20. The Court has already anticipated and rejected that argument in *Miranda*. 384 U.S. at 463 n.32 ("Our decision today does not indicate in any manner, of course, that these rules [Rule 5(a) and *McNabb-Mallory*] can be disregarded."). The government, moreover, never disputes that delay itself undercuts the value and effectiveness of *Miranda* by creating pressure to waive the *Miranda* rights. Pet. Br. 58-59.

The prompt presentment right protected by the *McNabb-Mallory* rule is broader than the rights guarded by *Miranda*. Most important, a defendant is not merely told of his right to counsel at the initial appearance; the Sixth Amendment right attaches and, if indigent, the defendant is immediately appointed (and may consult with) counsel. Fed. R. Crim. P. 5(d). In addition, the neutral magistrate reiterates the *Miranda* warnings in a non-coercive atmosphere, informs the defendant of the complaint and affidavit in support of the arrest, determines whether there is probable cause for the arrest, and addresses bail. *Id.*

Thus, a defendant's waiver of *Miranda* rights does not substitute for, and does not establish a knowing and intelligent waiver of, the right to prompt presentment. *See Moran v. Burbine*, 475 U.S. 412, 421 (1986) (to prove valid waiver of *Miranda* right, government must prove not only that waiver was voluntary, but also that defendant had "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.").[19]

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[19] The government cites five cases for the proposition that a valid waiver of *Miranda* rights bars any claim under *McNabb* or *Mallory*. Gov't Br. 45 n.20. But these cases are inapposite because they do not cite or address § 3501(c), and as a result they do not address the intent of Congress through that subsection to leave the *McNabb-Mallory* rule in place outside the six-hour time limitation. And in none of the cases was there unnecessary or unreasonable delay while the defendant was in federal custody; for that reason alone, the confessions were not excludable under the *McNabb-Mallory* rule and § 3501(c). *See United States v. Salamanca*, 990 F.2d 629, 633-34 (D.C. Cir. 1993) (delay not unreasonable given need to obtain interpreter); *United States v. Barlow*, 693 F.2d 954, 958 (6th Cir. 1982) (defendant in state, not federal, custody, and no evidence of collaborative arrangement with FBI agents, who were conducting independent investigation); *United States v. Indian Boy X*, 565 F.2d 585, 589 n.10 (9th Cir. 1977) (delay in presentment of juvenile caused only by need to file certificate under 18 U.S.C. § 5032 indicating that local county prosecutor refused to assume jurisdiction); *Pettyjohn v. United States*, 419 F.2d 651, 656 (D.C. Cir. 1969) (confessions not given during period of unnecessary delay); *O'Neal v. United States*, 411 F.2d 131, 136 (5th Cir. 1969) (delay not intentional, but instead necessitated by need to destroy illegal still, and by unavailability of magistrate).

The government also seeks, in a footnote, to distinguish *McNabb* and *Mallory* from Mr. Corley's case based on the fact that Mr. Corley's confessions concerned a different crime (bank robbery) than the one for which he was arrested (assault on a federal officer). Gov't Br. 46 n.21. The government suggests, without any case law support, that the *McNabb-Mallory* rule should be "offense specific," like the Sixth Amendment right to counsel. *See McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). But the *McNabb-Mallory* rule, as this Court repeatedly has made clear, was "'responsive to the same considerations of Fifth Amendment policy that . . . face[d] us . . . as to the states' in *Miranda*." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348 (2006) (quoting *Miranda*, 384 U.S. at 436). Unlike the Sixth Amendment right to counsel, the Fifth Amendment right to counsel is not "offense specific." *McNeil*, 501 U.S. at 177. That is why, as the government acknowledges, Gov't Br. 45, *all questioning* must stop upon an invocation of rights under *Miranda*. Thus there is no doctrinal basis for treating the *McNabb-Mallory* rule as being limited to confessions regarding the offense of arrest.

In any event, the overriding concern of the Court in *McNabb* and *Mallory* was to prevent delay in presentment from being used as a means of extracting a confession. That concern is equally compelling, regardless of whether the confession is to the offense of arrest, or to a different offense. To interpret the rule as allowing delay in presentment, so long as it is for the purpose of extracting a confession about

offenses for which the defendant has *not* been arrested, would create an absurd loophole. Exploitation of delay for the purpose of securing *any* confession is the unlawful practice the *McNabb-Mallory* rule was intended to guard against. *Mallory*, 354 U.S. at 455 ("[T]he delay must not be of a nature to give opportunity for the extraction of a confession").[20]

The definition of "confession" in § 3501(e), moreover, does not suggest that the *McNabb-Mallory* rule is offense specific. Subsection (e) defines "confession" as meaning "*any* confession of guilt of *any* criminal offense. . . . " 18 U.S.C. § 3501(e) (emphasis added). Thus, given the purpose of the *McNabb-Mallory* rule and the definition of "confession" in § 3501, it is clear that the rule must apply equally to a case like Mr. Corley's, where officers arrest on one offense and

---

[20] The government's suggestion that suppression of Mr. Corley's confessions would be an "unwarranted windfall," Gov't Br. 46 n.21, is without merit. The government is correct that the FBI agents could have approached Mr. Corley after his initial appearance before a magistrate on the assault charge to seek waiver of his rights and question him regarding the bank robbery. *See McNeil*, 501 U.S. at 175. But Mr. Corley would have been much better informed of his legal rights at that point than he was before his appearance. Most importantly, he would have been appointed counsel, and would have had the opportunity to consult with that counsel. A neutral magistrate would also have determined if there was probable cause for the arrest, would have told Mr. Corley exactly what charges he was facing, and would have addressed the issue of release on bail. It is far from certain that Mr. Corley would then have freely waived his rights and spoken with FBI agents had they come to interview him following this initial appearance.

then delay presentment in order to obtain a confession on a separate offense.

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be reversed, Mr. Corley's oral and written confessions should be held inadmissible, and the case remanded to the Court of Appeals with instructions to remand to the district court for a new trial.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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No. 07-10441

IN THE

Supreme Court of the United States

JOHNNIE CORLEY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether 18 U.S.C. § 3501 – read together with Fed. R. Crim. P. Rule 5(a), *McNabb* v. *United States*, 318 U.S. 332 (1943), and *Mallory* v. *United States*, 354 U.S. 449 (1957) – requires that a confession taken more than six hours after arrest and before presentment be suppressed if there was unreasonable or unnecessary delay in bringing the defendant before the magistrate judge.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and appropriate application of criminal statutes in accordance with the United States Constitution. Consistently advocating for the fair and efficient administration of criminal justice, members of the NACDL have a keen interest in assuring that 18 U.S.C. § 3501(c) continues to provide adequate protection for arrested individuals through the operation of the six-hour "safe harbor" constructed therein.

REASONS FOR GRANTING THE PETITION

In the broad experience of the NACDL's members, two problems arise from the Third Circuit's reading

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of § 3501(c). First, it introduces confusion and uncertainty in situations of presentment delay, given the unreliability of a "voluntariness" standard. Like other bright-line rules, § 3501(c) provides guidance to officers, courts, and attorneys in the form of a structure for decisionmaking. The Third Circuit's reading is in conflict with that of the Courts of Appeals for the Second, Ninth, and District of Columbia Circuits, and this disparity in interpretation increases the likelihood of disparate treatment of arrested individuals. Second, the Third Circuit "'reads subsection (c) out of the statute.'" *United States* v. *Alvarez-Sanchez*, 975 F.2d 1396, 1400 (9th Cir. 1992) (quoting *United States* v. *Perez*, 733 F.2d 1026, 1031 (2d Cir. 1984)), *rev'd on other grounds*, 511 U.S. 350 (1994). Review by this Court is necessary to restore the meaning of § 3501(c) to that which the statutory language supports and which Congress intended.

ARGUMENT

I. THE VITAL NEED FOR A BRIGHT-LINE RULE.

Section 3501(c)'s bright-line rule gives guidance to law enforcement, courts, and counsel regarding the length of permissible delay between arrest and presentation to a magistrate. If less than six hours elapses, the delay is generally insufficient to warrant exclusion and the court proceeds to voluntariness analysis. 18 U.S.C. § 3501(c); see *Alvarez-Sanchez*, 975 F.2d at 1399 ("The clear effect of [§ 3501(c)] is to create a six-hour 'safe harbor' during which a confession will not be excludable on the basis of the *McNabb-Mallory* rule."); *Perez*, 733 F.2d at 1035 (interpreting § 3501 to remove delays of less than six hours from the scope of *McNabb-Mallory*). Con-

versely, if more than six hours elapses, the resulting confession is likely inadmissible under *McNabb-Mallory*[2] unless the delay was reasonable due to transportation necessities. See *Perez*, 733 F.2d at 1031, 1035 (interpreting § 3501(c) to provide that a delay of more than six hours (that is not found reasonable) is an independent basis for excluding a confession, to be evaluated using the *McNabb-Mallory* rule). Reading § 3501(c) as it is written thus allows many cases falling into the latter category to be resolved in accordance with the established logical framework as opposed to an ad hoc voluntariness analysis.

A. Voluntariness Alone Invites Confusion And Uncertainty.

Giving effect to § 3501(c) mitigates the complex and uncertain task of determining voluntariness. The statutory test for determining voluntariness states that "the trial judge . . . shall take into consideration all of the circumstances surrounding the giving of the confession," and then provides a list of five factors[3]

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[2] The *McNabb-Mallory* rule arises from *McNabb* v. *United States*, 318 U.S. 332 (1943), and *Mallory* v. *United States*, 354 U.S. 449 (1957), and requires courts to exclude confessions made by a defendant after an unreasonable delay between arrest and presentment. The Court in *McNabb* and *Mallory* crafted this exclusionary rule to enforce Federal Rule of Criminal Procedure 5(a), which prohibits "unnecessary delay" in bringing the defendant to a magistrate.

[3] Those factors are:

(1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and

that "need not be conclusive." 18 U.S.C. § 3501(b). In *United States* v. *Dickerson*, 530 U.S. 428 (2000), the Court observed that the totality-of-the-circumstances voluntariness test codified in § 3501(a) is difficult both "for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Id.* at 444.

The United States itself acknowledged the difficulty and risks of inconsistency in applying the voluntariness test and vigorously argued that a voluntariness test alone was insufficient to protect a defendant's privilege against self-incrimination in the "inherently coercive" custodial context. Brief for the United States at 36-38, *Dickerson*, 530 U.S. 428 (No. 99-5525), *available at* 2000 WL 141075.[4] Yet, this is the only test the Third Circuit has recognized in considering the admissibility of confessions obtained after a delay in presentment. *United States* v. *Corley*, 500 F.3d 210, 217 (3d Cir. 2007).

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that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession."

18 U.S.C. § 3501(b).

[4] The United States argued:

> If *Miranda* warnings are not required, the result will be uncertainty for the police and an additional volume of litigation focusing on the totality-of-the-circumstances voluntariness standard. . . . As demonstrated by the thirty pre-*Miranda* confession cases decided by this Court under the due process test, the totality-of-the-circumstances voluntariness test is more difficult and uncertain in application than *Miranda*. Its many variables would complicate the task of law enforcement in assessing what procedures would reliably secure admissible confessions.

Brief for the United States at 38, *Dickerson*, 540 U.S. 428 (No. 99-5525) (internal citations and parenthetical omitted).

Litigating voluntariness in every case where the defendant challenges the admissibility of a confession would create a burden on the courts, in addition to fostering uncertainty among law enforcement officials and defense lawyers as to which confessions are likely to be excluded. See *id.* at 229 (Sloviter, J., dissenting) (noting that this issue "is important not only to Corley but to all arresting officers operating in this circuit" (footnote omitted)); see also *supra* n.4 If delay is but one factor within the voluntariness analysis, it further complicates an already complex determination: a delay over the statutory six hours would clearly weigh against voluntariness, but it would be unclear what other circumstances might compensate for such a delay. The result can only be confusion and inconsistency, and attempts by both sides to take advantage of that uncertainty.

B. Section 3501(c)'s Six-Hour Rule Provides Clarity And Consistency.

In contrast, § 3501(c)'s six-hour rule "conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness." In a closely analogous context, this Court has noted that this sort of presumption offers "clear and unequivocal" guidelines. *Edwards* v. *Arizona*, 451 U.S. 477 (1981) (invocation of right to counsel requires officers to cease questioning altogether, subject to certain exceptions such as defendant reinitiation); *Minnick* v. *Mississippi*, 498 U.S. 146, 151 (1990) (confirming the bright-line rule established in *Edwards* and reiterating its value in "conserv[ing] judicial resources which would otherwise be expended in making difficult determinations of voluntariness").

Bright-line rules provide clear, consistent guidance for law enforcement, reducing the likelihood of constitutional rights violations. As then-Solicitor

General Seth Waxman noted in oral argument for *United States* v. *Dickerson*, "one of the benefits that this Court has explained as recently as in *Minnick* and in *Moran* . . . for law enforcement and for the administration of justice generally[,] is the provision of rules that are easily applied and understood." Tr. of Oral Argument at 18, *Dickerson*, 530 U.S. 428, *available at* 2000 WL 486733. This Court has noted that bright-line rules are valuable precisely because they "can be readily applied by the police and the courts to a large variety of factual circumstances." Brief of the United States at 34 & n.24, *Dickerson*, 530 U.S. 428 (citing *Arizona* v. *Roberson*, 486 U.S. 675, 681 (1988); *Colorado* v. *Spring*, 479 U.S. 564, 577 n.9 (1987); *Moran* v. *Burbine*, 475 U.S. 412, 425 (1986); *Berkemer* v. *McCarty*, 468 U.S. 420, 432 (1984); *Fare* v. *Michael C.*, 442 U.S. 707, 718 (1979); *New York* v. *Quarles*, 467 U.S. 649, 664 (1984) (O'Connor, J., concurring in the judgment and dissenting in part)). By clearly demarcating the limits of permissible administration in the arrest context, bright-line rules like the six-hour "'safe harbor'" in § 3501(c), see *Alvarez-Sanchez*, 975 F.2d at 1399, create "'eas[y]'" and "'clear guid[es]'" for law enforcement in the complex arena of criminal procedure, Brief of the United States at 34 & n.24, *Dickerson*, 530 U.S. 428.

Other bright-line rules are effective and, like the *Miranda* rule, supported by both sides of the courtroom aisle. By hewing to such guidelines, individual rights are protected from intentional and unintentional violations and lawful convictions are upheld. See, *e.g.*, *United States* v. *Robinson*, 414 U.S. 218, 235 (1973) (creating a bright-line rule allowing for searches of individuals and the grabbing area incident to arrest); *Chambers* v. *Maroney*, 399 U.S.

42, 50-52 (1970) (creating a bright-line rule allowing searches of automobiles without a warrant as long as probable cause exists); *cf. Michigan* v. *Tucker*, 417 U.S. 433, 443 (1974) (noting that *Miranda* rules "help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost").

The six-hour rule of § 3501(c) has the additional imprimatur of Congress. The Third Circuit's decision in this case to give no effect to the safe-harbor provision creates not only a division with the circuits but also extends its supervisory powers in a manner that patently contravenes congressional will. See *Perez*, 733 F.2d at 1035 (finding that § 3501(c) expressed Congress's clear intention to limit application of the *McNabb-Mallory* rule only in situations of unreasonable pre-arraignment delays of less than six hours or reasonable delays of more than six hours).

II. AS A MATTER OF STATUTORY CONSTRUCTION § 3501 SHOULD BE INTERPRETED TO GIVE EFFECT TO THE § 3501(C) DELAY PROVISION.

In this case, even the Third Circuit majority admitted that "[w]ere we writing on a clean slate, we might agree [that the Second, Ninth, and D.C. Circuit Courts have the better of the argument regarding the proper interpretation of § 3501]." *Corley*, 500 F.3d at 219. The majority, however, felt constrained by a prior Third Circuit precedent, *Government of the Virgin Islands* v. *Gereau*, 502 F.2d 914 (3d Cir. 1974). *Corley*, 500 F.3d at 219-20. *Gereau*, however, relied on Second and Ninth Circuit cases that have since been rejected. *Id.* at 219-20 & n.6 (citing *United States* v. *Superville*, 40 F. Supp. 2d 672, 689 & nn.25-26 (D.V.I. 1999)).

As the Second Circuit has explained, Congress enacted the various subsections in § 3501 after *Miranda*, *McNabb*, and *Mallory* to alter the rules the Court crafted in those cases. *Perez*, 733 F.2d at 1032. Although subsequently held unconstitutional, *Dickerson*, 530 U.S. at 432, § 3501(a) was originally intended to address *Miranda* by providing that a determination of voluntariness was sufficient for admissibility in the absence of *Miranda* warnings. Likewise, Congress enacted § 3501(c) to change the *McNabb-Mallory* rule. Significantly, the initial draft of the bill lacked the six-hour safe harbor, and would have entirely overruled *McNabb-Mallory*. However, concern that the proposed rule would allow interrogations to go on indefinitely prompted the addition of the six-hour limitation on the Senate Floor. *Perez*, 733 F.2d at 1033 (citing 114 Cong. Rec. 14,184-86). This history demonstrates that § 3501(c) as enacted was meant to operate as a limitation on, but not a repudiation of, *McNabb-Mallory*'s prohibition of undue delay in presentment.

Although the text of § 3501(a), read in isolation, does suggest that admissibility of confessions is based only on voluntariness, such an interpretation "'reads subsection (c) out of the statute.'" *Alvarez-Sanchez*, 975 F.2d at 1400 (quoting *Perez*, 733 F.2d at 1031). Section 3501(c) provides, in relevant part, that a confession "shall not be inadmissible solely because of delay . . . if such confession is found by the trial judge to have been made voluntarily *and* . . . if such confession was *made or given by such person within six hours* immediately following his arrest or other detention" (subject to the reasonable delay for transportation exception). Section 3501(c) does not establish a presumption in favor of admissibility for confessions made by suspects within six hours of

arrest. Instead, it eliminates unreasonable delay as a potential reason to suppress a confession if given within six hours; it removes those confessions from the scope of the *McNabb-Mallory* rule. The logical corollary is that confessions uttered after six hours remain within the *McNabb-Mallory* rule and are thus inadmissible on the basis of delay except where the delay was reasonably incurred in transporting the defendant to the nearest magistrate. See *Corley*, 500 F.3d at 235-36 (Sloviter, J., dissenting).

This reading is further supported by Congress's choice of the term "inadmissible" rather than "involuntary" to explain the result from a delay over six hours. *Perez*, 733 F.2d at 1031. If § 3501(c) merely modified the other two sections, a delay longer than six hours would be a factor making the confession "involuntary." Because Congress instead drafted the statute so that such a delay is a factor making the confession "inadmissible," § 3501(c) provides an independent basis for finding the delayed confession inadmissible. *Perez*, 733 F.2d at 1031.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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RULE

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INTEREST OF *AMICUS CURIAE*[1]

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of § 3501(c). First, it introduces confusion and uncertainty in situations of presentment delay, given the unreliability of a "voluntariness" standard. Like other bright-line rules, § 3501(c) provides guidance to officers, courts, and attorneys in the form of a structure for decisionmaking. The Third Circuit's reading is in conflict with that of the Courts of Appeals for the Second, Ninth, and District of Columbia Circuits, and this disparity in interpretation increases the likelihood of disparate treatment of arrested individuals. Second, the Third Circuit "'reads subsection (c) out of the statute.'" *United States* v. *Alvarez-Sanchez*, 975 F.2d 1396, 1400 (9th Cir. 1992) (quoting *United States* v. *Perez*, 733 F.2d 1026, 1031 (2d Cir. 1984)), *rev'd on other grounds*, 511 U.S. 350 (1994). Review by this Court is necessary to restore the meaning of § 3501(c) to that which the statutory language supports and which Congress intended.

ARGUMENT

I. THE VITAL NEED FOR A BRIGHT-LINE RULE.

Section 3501(c)'s bright-line rule gives guidance to law enforcement, courts, and counsel regarding the length of permissible delay between arrest and presentation to a magistrate. If less than six hours elapses, the delay is generally insufficient to warrant exclusion and the court proceeds to voluntariness analysis. 18 U.S.C. § 3501(c); see *Alvarez-Sanchez*, 975 F.2d at 1399 ("The clear effect of [§ 3501(c)] is to create a six-hour 'safe harbor' during which a confession will not be excludable on the basis of the *McNabb-Mallory* rule."); *Perez*, 733 F.2d at 1035 (interpreting § 3501 to remove delays of less than six hours from the scope of *McNabb-Mallory*). Con-

versely, if more than six hours elapses, the resulting confession is likely inadmissible under *McNabb-Mallory*[2] unless the delay was reasonable due to transportation necessities. See *Perez*, 733 F.2d at 1031, 1035 (interpreting § 3501(c) to provide that a delay of more than six hours (that is not found reasonable) is an independent basis for excluding a confession, to be evaluated using the *McNabb-Mallory* rule). Reading § 3501(c) as it is written thus allows many cases falling into the latter category to be resolved in accordance with the established logical framework as opposed to an ad hoc voluntariness analysis.

A. Voluntariness Alone Invites Confusion And Uncertainty.

Giving effect to § 3501(c) mitigates the complex and uncertain task of determining voluntariness. The statutory test for determining voluntariness states that "the trial judge . . . shall take into consideration all of the circumstances surrounding the giving of the confession," and then provides a list of five factors[3]

---

[2] The *McNabb-Mallory* rule arises from *McNabb* v. *United States*, 318 U.S. 332 (1943), and *Mallory* v. *United States*, 354 U.S. 449 (1957), and requires courts to exclude confessions made by a defendant after an unreasonable delay between arrest and presentment. The Court in *McNabb* and *Mallory* crafted this exclusionary rule to enforce Federal Rule of Criminal Procedure 5(a), which prohibits "unnecessary delay" in bringing the defendant to a magistrate.

[3] Those factors are:

> (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and

that "need not be conclusive." 18 U.S.C. § 3501(b). In *United States* v. *Dickerson*, 530 U.S. 428 (2000), the Court observed that the totality-of-the-circumstances voluntariness test codified in § 3501(a) is difficult both "for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Id.* at 444.

The United States itself acknowledged the difficulty and risks of inconsistency in applying the voluntariness test and vigorously argued that a voluntariness test alone was insufficient to protect a defendant's privilege against self-incrimination in the "inherently coercive" custodial context. Brief for the United States at 36-38, *Dickerson*, 530 U.S. 428 (No. 99-5525), *available at* 2000 WL 141075.[1] Yet, this is the only test the Third Circuit has recognized in considering the admissibility of confessions obtained after a delay in presentment. *United States* v. *Corley*, 500 F.3d 210, 217 (3d Cir. 2007).

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that any such statement could be used against him. (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession."

18 U.S.C. § 3501(b).

[1] The United States argued:

> If *Miranda* warnings are not required, the result will be uncertainty for the police and an additional volume of litigation focusing on the totality-of-the-circumstances voluntariness standard. . . . As demonstrated by the thirty pre-*Miranda* confession cases decided by this Court under the due process test, the totality-of-the-circumstances voluntariness test is more difficult and uncertain in application than *Miranda*. Its many variables would complicate the task of law enforcement in assessing what procedures would reliably secure admissible confessions.

Brief for the United States at 38, *Dickerson*, 540 U.S. 428 (No. 99-5525) (internal citations and parenthetical omitted).

Litigating voluntariness in every case where the defendant challenges the admissibility of a confession would create a burden on the courts, in addition to fostering uncertainty among law enforcement officials and defense lawyers as to which confessions are likely to be excluded. See *id.* at 229 (Sloviter, J., dissenting) (noting that this issue "is important not only to Corley but to all arresting officers operating in this circuit" (footnote omitted)); see also *supra* n.4 If delay is but one factor within the voluntariness analysis, it further complicates an already complex determination: a delay over the statutory six hours would clearly weigh against voluntariness, but it would be unclear what other circumstances might compensate for such a delay. The result can only be confusion and inconsistency, and attempts by both sides to take advantage of that uncertainty.

B. Section 3501(c)'s Six-Hour Rule Provides Clarity And Consistency.

In contrast, § 3501(c)'s six-hour rule "conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness." In a closely analogous context, this Court has noted that this sort of presumption offers "clear and unequivocal" guidelines. *Edwards* v. *Arizona*, 451 U.S. 477 (1981) (invocation of right to counsel requires officers to cease questioning altogether, subject to certain exceptions such as defendant reinitiation); *Minnick* v. *Mississippi*, 498 U.S. 146, 151 (1990) (confirming the bright-line rule established in *Edwards* and reiterating its value in "conserv[ing] judicial resources which would otherwise be expended in making difficult determinations of voluntariness").

Bright-line rules provide clear, consistent guidance for law enforcement, reducing the likelihood of constitutional rights violations. As then-Solicitor

General Seth Waxman noted in oral argument for *United States* v. *Dickerson*, "one of the benefits that this Court has explained as recently as in *Minnick* and in *Moran* . . . for law enforcement and for the administration of justice generally[,] is the provision of rules that are easily applied and understood." Tr. of Oral Argument at 18, *Dickerson*, 530 U.S. 428, *available at* 2000 WL 486733. This Court has noted that bright-line rules are valuable precisely because they "can be readily applied by the police and the courts to a large variety of factual circumstances." Brief of the United States at 34 & n.24, *Dickerson*, 530 U.S. 428 (citing *Arizona* v. *Roberson*, 486 U.S. 675, 681 (1988); *Colorado* v. *Spring*, 479 U.S. 564, 577 n.9 (1987); *Moran* v. *Burbine*, 475 U.S. 412, 425 (1986); *Berkemer* v. *McCarty*, 468 U.S. 420, 432 (1984); *Fare* v. *Michael C.*, 442 U.S. 707, 718 (1979); *New York* v. *Quarles*, 467 U.S. 649, 664 (1984) (O'Connor, J., concurring in the judgment and dissenting in part)). By clearly demarcating the limits of permissible administration in the arrest context, bright-line rules like the six-hour "'safe harbor'" in § 3501(c), see *Alvarez-Sanchez*, 975 F.2d at 1399, create "eas[y]" and "clear guid[es]" for law enforcement in the complex arena of criminal procedure. Brief of the United States at 34 & n.24, *Dickerson*, 530 U.S. 428.

Other bright-line rules are effective and, like the *Miranda* rule, supported by both sides of the courtroom aisle. By hewing to such guidelines, individual rights are protected from intentional and unintentional violations and lawful convictions are upheld. See, *e.g.*, *United States* v. *Robinson*, 414 U.S. 218, 235 (1973) (creating a bright-line rule allowing for searches of individuals and the grabbing area incident to arrest); *Chambers* v. *Maroney*, 399 U.S.

42, 50-52 (1970) (creating a bright-line rule allowing searches of automobiles without a warrant as long as probable cause exists); *cf. Michigan* v. *Tucker*, 417 U.S. 433, 443 (1974) (noting that *Miranda* rules "help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost").

The six-hour rule of § 3501(c) has the additional imprimatur of Congress. The Third Circuit's decision in this case to give no effect to the safe-harbor provision creates not only a division with the circuits but also extends its supervisory powers in a manner that patently contravenes congressional will. See *Perez*, 733 F.2d at 1035 (finding that § 3501(c) expressed Congress's clear intention to limit application of the *McNabb-Mallory* rule only in situations of unreasonable pre-arraignment delays of less than six hours or reasonable delays of more than six hours).

II. AS A MATTER OF STATUTORY CONSTRUCTION § 3501 SHOULD BE INTERPRETED TO GIVE EFFECT TO THE § 3501(C) DELAY PROVISION.

In this case, even the Third Circuit majority admitted that "[w]ere we writing on a clean slate, we might agree [that the Second, Ninth, and D.C. Circuit Courts have the better of the argument regarding the proper interpretation of § 3501]." *Corley*, 500 F.3d at 219. The majority, however, felt constrained by a prior Third Circuit precedent, *Government of the Virgin Islands* v. *Gereau*, 502 F.2d 914 (3d Cir. 1974). *Corley*, 500 F.3d at 219-20. *Gereau*, however, relied on Second and Ninth Circuit cases that have since been rejected. *Id.* at 219-20 & n.6 (citing *United States* v. *Superville*, 40 F. Supp. 2d 672, 689 & nn.25-26 (D.V.I. 1999)).

As the Second Circuit has explained, Congress enacted the various subsections in § 3501 after *Miranda*, *McNabb*, and *Mallory* to alter the rules the Court crafted in those cases. *Perez*, 733 F.2d at 1032. Although subsequently held unconstitutional, *Dickerson*, 530 U.S. at 432, § 3501(a) was originally intended to address *Miranda* by providing that a determination of voluntariness was sufficient for admissibility in the absence of *Miranda* warnings. Likewise, Congress enacted § 3501(c) to change the *McNabb-Mallory* rule. Significantly, the initial draft of the bill lacked the six-hour safe harbor, and would have entirely overruled *McNabb-Mallory*. However, concern that the proposed rule would allow interrogations to go on indefinitely prompted the addition of the six-hour limitation on the Senate Floor. *Perez*, 733 F.2d at 1033 (citing 114 Cong. Rec. 14,184-86). This history demonstrates that § 3501(c) as enacted was meant to operate as a limitation on, but not a repudiation of, *McNabb-Mallory*'s prohibition of undue delay in presentment.

Although the text of § 3501(a), read in isolation, does suggest that admissibility of confessions is based only on voluntariness, such an interpretation "'reads subsection (c) out of the statute.'" *Alvarez-Sanchez*, 975 F.2d at 1400 (quoting *Perez*, 733 F.2d at 1031). Section 3501(c) provides, in relevant part, that a confession "shall not be inadmissible solely because of delay . . . if such confession is found by the trial judge to have been made voluntarily *and* . . . if such confession was *made or given by such person within six hours* immediately following his arrest or other detention" (subject to the reasonable delay for transportation exception). Section 3501(c) does not establish a presumption in favor of admissibility for confessions made by suspects within six hours of

arrest. Instead, it eliminates unreasonable delay as a potential reason to suppress a confession if given within six hours; it removes those confessions from the scope of the *McNabb-Mallory* rule. The logical corollary is that confessions uttered after six hours remain within the *McNabb-Mallory* rule and are thus inadmissible on the basis of delay except where the delay was reasonably incurred in transporting the defendant to the nearest magistrate. See *Corley*, 500 F.3d at 235-36 (Sloviter, J., dissenting).

This reading is further supported by Congress's choice of the term "inadmissible" rather than "involuntary" to explain the result from a delay over six hours. *Perez*, 733 F.2d at 1031. If § 3501(c) merely modified the other two sections, a delay longer than six hours would be a factor making the confession "involuntary." Because Congress instead drafted the statute so that such a delay is a factor making the confession "inadmissible," § 3501(c) provides an independent basis for finding the delayed confession inadmissible. *Perez*, 733 F.2d at 1031.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 19, 2008

JOINT APPENDIX

Supreme Court, U.S.
FILED
NOV 19 2008
OFFICE OF THE CLERK

No. 07-10441

In The Supreme Court of the United States

JOHNNIE CORLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

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Certiorari Granted October 1, 2008

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RELEVANT DOCKET ENTRIES

United States v. Johnnie Corley
District Court Case No. 03-cr-00775-1

DCT DOCKET ENTRY NO. 1

INDICTMENT as to Johnnie Corley (1) count(s) 1, 2, 3. (tj,) (Entered: 11/21/2003)

DCT DOCKET ENTRY NO. 2

ORDER Appointing Federal Public Defender as to Johnnie Corley. Signed by Judge Diane M. Welsh on 12/4/03. 12/5/03 Entered and Copies Faxed. (jh,) Additional attachment(s) added on 12/5/2003 (cmc,). (Entered: 12/05/2003)

DCT DOCKET ENTRY NO. 15

MOTION to Suppress *Post-Arrest Statements,* Cert. of Service, Proposed Order by Johnnie Corley. (Cooper, Benjamin) Modified on 2/2/2004 (cmc). (Entered: 01/30/2004)

DCT DOCKET ENTRY NO. 22

ORDER/Government's Opposition to Defendant's Motion to Suppress Post-Arrest Statements/Certificate of Service/Attachment (Advice of Rights) filed by USA (Attachments: #1) (Mann, Kenya) Modified on 2/19/2004 (cmc). (Entered: 02/18/2004)

DCT DOCKET ENTRY NO. 26

ORDER that 15 Motion to Suppress Post-Arrest Statements as to Johnnie Corley (1) is Denied in Part and Judgment is Reserved in Part as Follows, etc.; No Later than 4/23/04, Deft Shall File a Supplemental Brief Regarding the Admissability [sic] of a Confession Obtained from a Prisoner While he was Under Arrest for a Different Offense for Which he may Not have Been Timely Arraigned; by 5/3/04, the Govt. Shall Respond to Defts Supplemental Brief. Signed by Judge Berle M. Schiller on 4/13/04. 4/14/04 Entered and Copies Faxed. (cmc,) (Entered: 04/14/2004)

DCT DOCKET ENTRY NO. 27

TRANSCRIPT of Proceedings as to Johnnie Corley held on 4/13/04, before Judge Schiller. Court Reporter: ESR. (jh,) (Entered: 04/16/2004)

DCT DOCKET ENTRY NO. 28

Supplemental Memorandum of Law & MOTION to Suppress *Statement* by Defendant Johnnie Corley, Certificate of Service. (Cooper, Benjamin) Modified on 4/23/2004 (fh) (Entered: 04/22/2004)

DCT DOCKET ENTRY NO. 29

Govt. Supplemental RESPONSE in Opposition re 15 Motion to Suppress *Post-Arrest Statements and Certificate of Service.* (Mann, Kenya) Modified on 5/4/2004 (cmc). (Entered: 05/03/2004)

DCT DOCKET ENTRY NO. 30

MEMORANDUM AND ORDER That Upon Consideration of Deft's Motion in Limine to Suppress Post-Arrest Statements (Doc. #15), Deft's Supplemental Memorandum of Law (Doc. #28), and the Responses Thereto, it is Ordered that Deft's Motion is Denied. Signed by Judge Berle M. Schiller on 5/10/04. 5/11/04 Entered and Copies Mailed and Faxed. (jh,) (Entered: 05/11/2004)

DCT DOCKET ENTRY NO. 43

Minute Entry for proceedings held before Judge Berle M. Schiller. Voir Dire begun on 9/27/2004. Johnnie Corley (1) on Count 1,2,3. Jurors selected and sworn. Court Reporter esr. (jh,) (Entered: 09/29/2004)

DCT DOCKET ENTRY NO. 44

Trial of 9/28/04 Resumes. JURY VERDICT as to Johnnie Corley (1) Guilty on Count 1,2; Johnnie Corley (1) Not Guilty on Count 3. Jurors Dismissed. Sentencing date to be set. (jh,) (Entered: 09/29/2004)

DCT DOCKET ENTRY NO. 58

JUDGMENT as to Johnnie Corley (1), Count(s) 1, Imprisonment 170 Months; Supervised Release 3 Years; Fine 500.00; Restitution in the Sum of 47,532.36; Special Assessment 200.00; Count(s) 2, Imprisonment 170 Months; Supervised Release 5 Years; Fine 500.00; Restitution in the Sum of 47,532.36; Special Assessment 200.00; Count(s) 3, Not Guilty. Signed by Judge Berle M. Schiller on 12/21/04. 12/22/04 Entered. (jh,) (Entered: 12/22/2004)

DCT DOCKET ENTRY NO. 59

NOTICE OF APPEAL by Johnnie Corley re [58] Judgment, Cert. of Service. (Cooper, Benjamin) Modified on 12/23/2004 (cmc). (Entered: 12/22/2004)

United States v. Johnnie Corley
Court of Appeals Case No. 04-4716

COA DOCKET ENTRY 08/31/2007

PRECEDENTIAL OPINION (Sloviter and Ambro, Authoring Judge, Circuit Judges and *Thompson, District Judge) with dissenting opinion by Judge Sloviter, filed. *Honorable Anne E. Thompson, Senior United States District Judge for the District of New Jersey, sitting by designation.

COA DOCKET ENTRY 08/31/2007

JUDGMENT, the judgment of conviction entered September 29, 2004 is affirmed. The judgment of sentence entered December 21, 2004, is hereby vacated with respect to the portion of the District Court's restitution order that sets the schedule of Corley's restitution payments and remanded to the District Court so that it may schedule the payments in accordance with the Mandatory Victims Restoration Act of 1996. The judgment of sentence of the District Court in all other respects is affirmed, filed.

COA DOCKET ENTRY 11/16/2007

ORDER (Scirica, Chief Judge, Sloviter, McKee, Rendell, Barry, Ambro, Authoring Judge, Fuentes, Smith, Fisher, Chagares, Jordan, Hardiman, Circuit Judges and *Thompson, District Judge) denying petition for en banc rehearing by Appellant Johnnie Corley. Judge Sloviter would have granted rehearing, filed. *Honorable Anne E. Thompson, Senior United States District Judge for the District of New Jersey, sitting by designation.

Johnnie Corley v. United States
Supreme Court Case No. 07-10441

SCT DOCKET ENTRY APR 14 2008

Petition for a Writ of Certiorari and Motion for Leave to Proceed in Forma Pauperis filed. (Response due May 19, 2008)

SCT DOCKET ENTRY OCT 1 2008

Motion to Proceed in Forma Pauperis and Petition for a Writ of Certiorari GRANTED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

– – –

UNITED STATES OF AMERICA	: CRIMINAL NO. 03-775
	: Philadelphia, Pennsylvania
v.	: April 13, 2004
JOHNNIE CORLEY	: 10:00 o'clock a.m.

. . . . . .

SUPPRESSION HEARING
BEFORE THE HONORABLE BERLE M. SCHILLER
UNITED STATES DISTRICT COURT JUDGE

– – –

APPEARANCES:

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– – –

Audio Operator: Chris Campoli

Transcribed by: Grace L. Williams, CET

(Proceedings recorded by electronic sound recording; transcript provided by AAERT-certified transcriber.)

– – –

[2] THE COURT: All right, please be seated. This is the case of United States versus Johnnie Corley and the number is 03-775 and this is a suppression hearing.

Counsel, please identify yourselves for the record.

MS. MANN: Your Honor, present for the Government is Kenya Mann and with me is Pennsylvania State Trooper Vincent D'Angelo.

THE COURT: All right.

MR. COOPER: Good morning, sir. Benjamin Cooper from the Federal Defenders and this is Mr. Corley.

THE COURT: Do you want to swear in the defendant, please?

JOHNNIE CORLEY, Defendant, Sworn.

THE COURT: All right. Ms. Mann, do you want to begin?

MS. MANN: Your Honor, our first witness will be Investigator Samuel Turner.

MR. COOPER: Your Honor, we'd respectfully move for sequestration of any remaining witnesses.

MS. MANN: The – I'd ask that Trooper D'Angelo remain the room. He will testify but he's

also acting as a case agent this morning. I don't think that's improper, we get to do that at trial as well.

[3] THE COURT: Well, here's what we'll do, make it simple. Let that agent stand outside, let Mr. D'Angelo go on first.

MS. MANN: Your Honor, I'm trying to put it in some order. If your Honor would like Trooper D'Angelo to step outside I would do that. I don't want to go out of order.

THE COURT: Okay, Mr. D'Angelo, you want to wait outside? Is this the agent who was in Florida?

MS. MANN: No, he's still in Florida.

THE COURT: Still in Florida.

MS. MANN: Still in Florida.

THE COURT: And it's raining down there.

MS. MANN: Well, he's still in Florida, I spoke to him this morning.

MR. COOPER: It's April.

THE COURT: Hmm. Come on right up here.

THE WITNESS: Good morning, your Honor.

THE COURT: Good morning.

SAMUEL TURNER, Government's Witness, Sworn.

THE COURT CLERK: Please state your name for the record.

THE WITNESS: Investigator Samuel Turner.

DIRECT EXAMINATION

BY MS. MANN:

Q Investigator, where are you currently employed – [4] Investigator Turner, who are you employed with?

A I'm currently employed with the First Judicial District of Pennsylvania, Court Warrant Unit.

Q Okay. And what is your title?

A I'm a senior investigator.

Q Okay, could you tell us what you –

THE COURT: That's the Common Pleas Court in Philadelphia?

THE WITNESS: Yes, your Honor.

THE COURT: Okay, go ahead.

BY MS. MANN:

Q What are your duties and responsibilities as a senior investigator?

A As a senior investigator my duties and responsibilities are to dispose of bench warrants by

means of walk-in and/or arrest. I also conduct administrative duties, prisoner transportation and I also liaison with other agencies.

Q How long have you been a senior investigator?

A Since October of 1993.

Q So you basically arrest people on bench warrants or when they turn themselves in you handle that?

A That's correct.

THE COURT: Is there some dispute as to whether or not there was a bench warrant out for this defendant?

MR. COOPER: There is no dispute that there was an [5] active bench warrant, sir.

MS. MANN: Okay, I'll move on. It's preliminary.

THE COURT: I was going to say maybe his testimony is not really –

MS. MANN: No, we need to set the scene for your Honor as to what happened during the rest because there's some allegations made –

THE COURT: Okay, go ahead.

MS. MANN: – in defense motions.

THE COURT: Go ahead.

BY MS. MANN:

Q I'd like to direct your attention to September 17th of 2003. Were you working on that day?

A Yes, I was.

Q Okay, where were you assigned?

A I was assigned to the FBI's violent crime fugitive task force.

Q Okay. Do you remember some of the names of the agents you were working with on that day?

A Yes, there was Special Agent Vito Roselli, Agent Trooper Fencid, his last name escapes me now but he shared in them also, Special Agent Kevin McShane and a few others.

Q Okay. And you were going to a place in Sharon Hill, Pennsylvania, 1318 Woodland Avenue in Sharon Hill, correct?

A That sounds correct.

[6] Q Okay. And what – what was your assignment when you went out there?

A On that particular date I was met by – we met Vito Roselli out there. He had given us information on Mr. Corley's whereabouts and also –

Q Do you see Mr. Corley in the courtroom today?

A Yes, sitting on the left with the green jumpsuit on.

Q Indicating the defendant for the record.

A We received information on his vehicle as well as a possible, possible location that he may be inside of. We set up a surveillance on the vehicle and of the location. My particular position was in the rear of the location.

Q And did there come a time that you received information –

A Yes.

Q – regarding the defendant?

A Yes. At one point during our surveillance we received information that he had exited the location and was entering the vehicle.

Q When you say he, you mean –

A Mr. Corley, I'm sorry, the defendant. Mr. Corley exited the residence, was inside the vehicle, at which point I proceeded down the vehicle. My duty on that day was to block his vehicle from escape and to basically block him in to keep him from getting away.

Q You mean in the driveway?

[7] A In the driveway, that's correct. I pulled down the driveway, I positioned my vehicle in the rear of his vehicle to block his escape. At which point, as I exited my vehicle, he put his vehicle in reverse.

As I'm exiting my vehicle, I'm pulling my badge out as well as my firearm. As I'm doing that I also identified myself, you know, as Police Warrant Unit, Police Warrant Unit basically in the back of the car where he can see it visibly. I could see him looking back and at which point he puts the car in reverse and rams my vehicle. I get out of the way, go to the passenger side of the vehicle, still yelling "police" and identifying myself at which point I noticed Mr. Corley in the driver's seat of the vehicle, once again still in the driver's seat but there's a nine year old girl or approximately nine year old girl in the passenger seat of the vehicle.

I'm standing there with my badge out so I decided to put my badge away and he's going for the reverse, then he reaches over in the back seat as for what I don't know but I feared for my safety. So I opened the door up to the vehicle. As I'm opening the door to the vehicle he's still reaching in the seat and his daughter is screaming and yelling and screaming and I've got my firearm at my side because I have no idea what he's doing.

At which point I decided to get the young lady out of the car and out of harm's way. I grab her and as I'm [8] grabbing her he's coming at me also. As he's coming at me, I'm coming back and he's in a Jeep Cherokee which is positioning him over top of me as well as the young lady on top of me.

I grab her and threw her to the side for her own protection. He comes at me and I tried to basically

subdue him at that point and he gets the best of me and we kind of both fall to the ground. He hits the ground, I hit the ground, he bounces off. We get into a foot chase, myself, the defendant, Agent Roselli, we get into a foot chase. The other officers, I guess, are pinned behind us or going back for vehicles, I don't know. But Agent Roselli's immediately behind him in a foot chase and so am I, I'm behind Agent Roselli.

We chased him over a street, through some yards, down in a creek, up an embankment and to the rear of a property, I believe it was 1637 Sharon Park Drive, at which point I catch up with he and Agent Roselli and there's a struggle going on. Agent Roselli has attempted to handcuff him and I, at which point when I catch up with him we do finally subdue him and he is placed in handcuffs.

Q At any point during this chase or struggle was a gun placed in the defendant's hand?

A No, it was not.

Q The little girl is fine?

[9] A As far as I know.

Q And did you participate in the defendant – well, strike that. Did you notice whether the defendant was injured?

A Uhm, he was able to walk. It looks like he did have a minor cut or I mean something very minor.

Q Okay.

A But –

THE COURT: Where was it?

THE WITNESS: I believe it was a hand or it was some minor injury. I mean there was an injury, I just don't, I'm sorry, I just don't recall what exactly it was.

BY MS. MANN:

Q Okay. And at that point you split up from the rest of the investigators and you went back to what your duties were that day?

A That's correct, I went back and – to the paperwork.

Q Okay. Now, when you said there was – you were at the passenger's side was Agent Roselli over at the driver's side at that point?

A Yes, they were all basically pinned on the other side of the vehicle because he was pinned between a house, a fence and my car. He was penned in, there was nowhere for him to go and there was also no way for the other agents to basically come to my side of the car without having to make a complete run around the other cars. They were on one side of [10] the car in a crossfire and I'm on the other side of the car in a crossfire.

Q And everybody's guns are drawn?

A Yes.

Q And the little –

MR. COOPER: I'm sorry, I didn't hear that.

MS. MANN: Everyone's guns were drawn.

THE WITNESS: That's correct.

BY MS. MANN:

Q Okay, and the little girl was fine?

A Yes.

MS. MANN: I have no further questions.

THE COURT: Mr. Cooper.

CROSS-EXAMINATION

BY MR. COOPER:

Q Good morning, Officer. You're in the Warrant Unit, is that a fair statement to make?

A I'm sorry, repeat?

Q That you're in the warrant, part of the Warrant Unit?

A Yes, I am.

Q To execute warrants for arrests for whatever reasons, is that correct?

A That's correct.

Q And it's Philadelphia Court of Common Pleas, is that right?

[11] A At that time I was specially deputized United States Marshal and I was part of a Violent Crime Fugitive Task Force.

Q Now were you deputized on that particular day?

A That's correct.

Q And you were deputized on that particular day because Agent Roselli requested your assistance, is that correct?

A That's incorrect. Immediately while joining the task force they began the deputization process at that point. So as soon as you join the task force they basically start the process of deputization and that goes through your tenure of being involved in the task force.

Q So did you join the task force? I'm having a little trouble following that, did you join the task force on September 17th?

A No, that's incorrect.

Q Or it was previous to that?

A No, it was previous to that. I was selected for the task force.

Q Okay. How previous to that were you selected for the task force?

A I believe it was, let's see, I was there for a total of three years so probably about a year, maybe a year, year and a half before that. I had been there for some time, I mean a long time.

[12] Q But this was the first day you had been deputized, am I correct to assume that?

A No, no.

Q Okay.

A Immediately on joining the task force which I want to say 2002 maybe, in 2002 at which point part of becoming a part of that Federal Task Force is to become deputized.

Q Okay. Now when you say deputized is that to assist in Federal arrests?

A That's correct.

Q Okay. So the bench warrant, if I'm correct, is a Philadelphia Common Pleas bench warrant?

A That's correct.

Q And it's not related to a Federal investigation, is that fair to say?

A No, that's incorrect.

Q It's related to a Federal investigation?

A That's correct because my duties there at that time where if we are obtained, if I bring in a bench warrant from my agency it's because we are going to

do a 90-day preliminary inquiry to see if the subject has fled the area or conduct a 90-day preliminary inquiry in order to obtain an unlawful flight to avoid prosecution warrant.

Q And would that be a State warrant?

A No, that would be a Federal warrant.

[13] Q That would be a Federal warrant. But you had information that Corley was in Sharon Hill area, is that correct?

A That's correct.

Q And that he was at a location, a residence, is that correct?

A That's correct.

Q So he hadn't left the jurisdiction at that particular point, is that correct?

A Which jurisdiction are you talking about?

Q Pennsylvania.

A No.

Q He had – he was in Pennsylvania?

A Correct.

Q Agent Roselli also informed you that Mr. Corley was a suspect in an armed bank robbery from Norristown area, is that also true?

A I don't recall if he did or if he didn't. My concern that day was to clear the bench warrants and the Common Pleas Court matters up.

Q Well, I guess the question I have is this: you were called by Agent Roselli about Johnnie Corley, is that fair to say?

A Yes, on that morning, yes.

Q Okay. Is that a telephone call or a some other type of call?

[14] A On that morning I'm not sure if it was a telephone call or if it was a call on radio because we had been out that morning looking for other fugitives. I'm not sure which one it was.

Q All right. Now, as far as Johnnie Corley was concerned, as far as Johnnie Corley being a fugitive or being wanted on an active bench warrant is it correct to say that when Mr. or when Agent Roselli contacted you that morning about Mr. Corley that's when you found out that he had an active bench warrant, is that fair to say?

A No, that's not fair to say.

Q You knew he had an active bench warrant before that day?

A No. I could have known that he would have had an active bench warrant before that one, there's been several occasions. Like I said, my job in that Federal Task Force is anyone that has a bench

warrant, probation violation of any kind we received information from anybody and we get it all the time.

Q I understand.

A If someone calls up and says: Joe Blow is at 12 Three Street and he has a bench warrant, well, we're not just going to stand out there we're going to act on it. And that particular morning I acted on it. It could have been a situation where, you know, Agent Roselli and myself talked a week before that or a year before that and I knew, you know, [15] there was a warrant, I got a copy of the warrant, got a copy of the photo, said okay, when the time comes if you get any more information we'll go out and we'll make the arrest.

Or it could have been a situation where I decided I wanted to open a particular case up. There's several different ways for us to find fugitives. I just can't sit here and say what you're asking me to say.

Q Okay. The question I'm trying to get to, the issue I'm trying to point out to is this: did you know on September 17th that Agent Roselli was investigating Johnnie Corley for a bank robbery, did you know that?

A I'm not a hundred percent sure on that. I mean I'm going back to –

Q You're not a hundred percent sure?

A Counsel, I'm going back to memory, I'm not sure.

Q Well, you remember that Johnnie Corley had a bench warrant, you remember that?

A That's correct.

Q Okay. You remember talking with Agent Roselli off and on during a year's period of time about Johnnie Corley, you remember that?

A I've talked to Agent Roselli about hundreds of people.

Q Okay, but I'm referring to Johnnie Corley now.

A Hundreds.

Q You talked to him about Johnnie Corley, right?

[16] A Okay. Right.

Q You remember that, you told us that today.

A Right.

Q But you don't remember Agent Roselli telling you that he was a suspect in an armed bank robbery?

MS. MANN: Objection, asked and answered.

BY MR. COOPER:

Q Is that your testimony?

THE COURT: Overruled.

THE WITNESS: Counsel, I can't remember if I did talk to him about it, if it was before the

situation, after the situation and I don't want to tell you something that's not completely true.

BY MR. COOPER:

Q In the day of September 17th when you went to the area were you – you were in a patrol or in your vehicle, were you alone in the vehicle or was somebody with you?

A I was alone in my vehicle.

Q You proceed to where this car is where Mr. Corley is inside, you and Agent Roselli and other officers, is that correct?

A That's correct.

Q And you surround the car, is that correct?

A That's correct.

Q And you exit your car and the other agents exit their [17] car, is that correct?

A That's correct.

Q And their guns are out, is that correct?

A Well, I know mine was and at the point when they got out of their vehicles, I don't know. But when we approached the vehicles, as I'm looking at him, Mr. Corley and the other officers, I could see guns then. But as far as when they got out of their vehicles and what point they pulled their weapons, I couldn't tell you.

Q Okay. But they, several officers approached from the other side of the car, the other side from you, the driver's side, with guns out, is that fair to say?

A At some point when I looked up to see them their guns were out.

Q All right. Now, there is a chase of Mr. Corley, is that correct?

A That's correct.

Q You participate in the chase?

A That's correct.

Q Agent Roselli participates in the chase?

A That's correct.

Q And Mr. Corley, when he runs away, does anybody fire their weapon?

A There's an accidental discharge, yes.

Q Whose?

[18] A Agent Roselli.

Q How do you mean accidental discharge. Did you see a discharge?

A I heard it.

Q Well, why do you call it accidental if you didn't see it?

A That's what it was ruled.

Q But if you didn't see it, how do you know?

MS. MANN: Objection, your Honor.

THE COURT: He said evidently there was an investigation which is done all the time when a gun is discharged and there must have been a finding. Is that true?

THE WITNESS: That's correct. I believe it was –

THE COURT: Who made the finding?

THE WITNESS: I believe one of the – the FBI makes the finding on that but as far as I remember there was an investigation and it was ruled an accidental discharge.

BY MR. COOPER:

Q Did you testify during that investigation?

A No, I did not.

Q How many shots in the discharge, one or more than one?

A I was only able to hear one.

Q This discharge happened before Mr. Corley was captured, is that fair to say?

A That's correct.

Q Now when Mr. Corley was captured he had run through a [19] creek and he had evidently cut his hand, you said, you described it as a minor cut somewhere?

A I'm no doctor. I just used the term "minor cut."

Q Okay.

A I mean he wasn't bleeding profusely, I can put it that way.

Q Okay. He was taken to the hospital for treatment though, are you aware of that?

A I believe he was taken to the hospital.

Q Let me ask you about this. When Mr. Corley was put in handcuffs the prosecutor asked you did you return back to your normal duties for the day. So did you go to the Sharon Hill Police Station with Mr. Corley that day?

A No, I did not.

Q And the time that all this happened, when you came to that scene in Sharon Hill and arrested Mr. Corley, was that about 8:00 o'clock in the morning, is that a fair description of the time?

A Uhm, it was somewhere around 8:00 o'clock in the morning.

Q Okay. If I were to describe Mr. Corley's condition after he was arrested would you say that he was – his clothes were wet, would you say that, as far as your memory is concerned?

A Yes.

Q Would you say that he was dazed in any way?

A I don't know Mr. Corley as far as what his normal [20] condition is so I would not be able to testify what he would be that day, what he wouldn't have been that day. He was coherent, he was able to hold a conversation, he was winded. as far as being dazed, I don't know about being dazed. He was very winded, it was a long chase, there was a lot of adrenaline going and he's just tired.

Q All right. When you say there was a conversation, he was coherent to a conversation, tell me about that for a second. You had a conversation with Mr. Corley or did somebody else and you witnessed the conversation?

A It sounded like there was a conversation going and I looked at him and he was breathing, seemed fine to me.

Q Is this a conversation outside after he was arrested?

A This is outside and in the presence of Agent Roselli and any other officers that were there.

Q Do you remember what the conversation was about?

A No, I do not.

MR. COOPER: Okay, nothing further, your Honor.

MS. MANN: Let me ask redirect.

REDIRECT EXAMINATION

BY MS. MANN:

Q You had authority to arrest Corley on those bench warrants on that date, September 17th . . .

A That is correct, that bench warrant's for the – for the State of Pennsylvania.

[21] Q Okay. And he also was arrested for assaulting a Federal officer, correct?

A That's correct.

Q Okay. Going back to the situation in the vehicle, was Mr. Corley trying to protect his daughter and pull her back or was he pushing his daughter toward you?

A Absolutely not. He was coming pushing her, as he was getting out of the vehicle, he's pushing her out of the way, pushing her right in the way of me. He was using her as a shield.

MR. COOPER: Objection.

MS. MANN: No further questions.

THE COURT: Overruled. Let me – do you have any more questions?

MR. COOPER: I have one, your Honor.

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MR. COOPER:

Q Was he arrested for bank robbery that day?

A That I'm not sure of.

THE COURT: Let me ask you a question. You said there was a, using your words, an accidental discharge of a weapon. Did anyone ever find the bullet?

THE WITNESS: No.

THE COURT: How far away from you was Roselli when [22] you heard the gun go off?

THE WITNESS: Approximately 20 feet.

THE COURT: Was he running at the time?

THE WITNESS: We were, yes, we were running.

THE COURT: Was it in the beginning of the chase from the car?

THE WITNESS: No, it was basically it was in the middle. The creek actually was in the middle of the chase so you figure we start the car, we run between houses, cross the street, in between some houses, down into a creek, about 20, 30 feet down the creek, creek bed, which was water in it, then we start, at least I start at one angle on the embankment and I could see Vito go up the other end of the embankment. And Mr. Corley had, he still had some distance

on Agent Roselli. So I mean there was – there was some distance between all of us but I mean I could basically see Vito out of the corner of my eye.

THE COURT: Are you in better shape now?

THE WITNESS: No, actually I'm in worse shape, your Honor.

THE COURT: Oh, okay. All right, I have no further questions.

MR. COOPER: May I just follow up with one?

THE COURT: Go ahead.

BY MR. COOPER:

[23] Q At the car where the little girl was did you testify earlier that Mr. Corley pushed the daughter out of the car? Is that what you testified to earlier?

A What I'm testifying is I'm here with my weapon.

Q Right.

A My badge is put away. I'm trying to get the young lady out of the way. She's frozen in her seat from the screaming and yelling and all the chaos that's going on. He is trying to get out of the vehicle, he is in no way trying to help her or protect her. He is pushing her on me and I still have problems with that whole situation.

Q I understand that. Did you pull the girl out of the car?

A She was pushed on me. When she was getting pushed the last thing I wanted was her to be accidentally shot or stepped on by anybody in that situation, so I had to protect her because he wouldn't.

Q When you grabbed hold of the girl where was Mr. Corley?

A Counselor, when I grabbed the girl, she was being pushed on me. If you want I can stand up and demonstrate what happened to her and me, if that's okay with you because you're not understanding me.

Q I'm just asking a question, where was –

THE COURT: Go ahead, I want to see it. I want to see it.

THE WITNESS: May I?

[24] THE COURT: No, stand right there.

THE WITNESS: Okay. This is me at the door of the vehicle, this is me, I pull the door open. I'm standing her like this. He's on the driver's side of the car and this is the console in between, this is his daughter. He's doing this.

BY MR. COOPER:

Q Reaching under.

A Reaching under the seat of the car. I have no idea what he's reaching for. I'm over here. The young lady is sitting right in front of me.

Q On the passenger's.

A I'm on the – back on the passenger's side of the car, I'm here like this.

Q With your gun in hand?

A With my gun in my hand because I don't know what he's reaching for over there. At which point I said let me get this little girl out of the way because I don't know what he's reaching for. I grab her and as I'm grabbing her he uses that as his window of opportunity and proceeds to push her into my direction. I'm falling back like this, throw her out of the way and I grab him.

Q So you threw her to your –

A I threw her to my left side, go right, left, I throw her out of the way. As I do that I'm falling back like this, he [25] comes out of the car, he's on top of me because he's in a Jeep Cherokee and he's over me coming out of the car like this, and I'm like this. Now I know he doesn't have a weapon on him at this time so I had to pull my weapon back and take my off hand and throw him to the ground where we both fall, he bounces up and a foot chase begins.

Q Are you alone when that happens, are you by yourself?

A As I throw him to the ground, Agent Roselli is jumping across the hood of the vehicle to try and come and assist me.

THE COURT: Did you ever find out what he was reaching for?

THE WITNESS: We went back to the vehicle, it was a search of the vehicle and there was nothing behind the vehicle. I don't know if it was a bluff or whatever it was but it was enough to scare the daylights out of me because I thought something was going to happen to that little girl.

THE COURT: All right.

BY MR. COOPER:

Q Did you suffer any injuries as a result of this?

A No, I did not.

MR. COOPER: That's all I have, your Honor.

BY MS. MANN:

Q A lot of adrenaline going that morning?

A Absolutely. It just brought it back out, I mean I'm [26] sorry.

MS. MANN: No further questions.

THE COURT: Okay, thank you, you're excused.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

THE COURT: Call your next witness.

MS. MANN: Next witness will be Trooper D'Angelo.

Can I excuse him?

THE COURT: Yes, he's excused.

MS. MANN: You can go if you want.

(Pause.)

VINCENT D'ANGELO, Government's Witness, Sworn.

THE COURT CLERK: Please state your name for the record.

THE WITNESS: Vincent K. D'Angelo.

THE COURT CLERK: Spell your last name.

THE WITNESS: D-'A-n-g-e-l-o.

MS. MANN: May I?

THE COURT: Proceed.

DIRECT EXAMINATION

BY MS. MANN:

Q Trooper D'Angelo, where are you currently employed?

A With the State Police in the Skippack Barracks.

Q Pennsylvania State Police?

A Yes.

[27] Q Okay. And how long have you been employed there?

A I started in January of '99.

Q Okay. And what are your duties and responsibilities, you said you're in Skippack but I know they are assigned to troops, so could you tell the Court where you're assigned and what you do?

A I'm a criminal investigator and criminal investigators in the State Police are Troop positions which means you're assigned to a troop, so I'm assigned to Troop K and the local station is Skippack. Primarily what I do is follow up on major, major crimes, things that would take a little more time to fully investigate.

Q Long-term investigation?

A Yes.

THE COURT: So I won't ever find you on the turnpike, right?

THE WITNESS: Not in my current position, no, your Honor.

MS. MANN: And he won't be speeding, either.

THE COURT: What can I say?

(Laughter.)

BY MS. MANN:

Q Trooper D'Angelo, I'd like to direct your attention to September 17th, 2003, were you working with, cooperating with the task force, the FBI Violent Crimes Task Force on that [28] day?

A Yes.

Q Okay. And the agent assigned was Agent Vito Roselli, correct?

A That's correct.

Q Okay. Were you in the area of Sharon Hill, Pennsylvania on Woodland Avenue on that day?

A I was.

Q And were you present for the arrest of anyone on that day?

A I was present in the area, I got actually to Mr. Corley and Agent Roselli after Mr. Corley was in handcuffs but I was in the area at the time.

Q Okay. And do you see Mr. Corley in the courtroom today?

A I do.

Q Okay. Could you point him out for the Court?

A He's the gentleman sitting in the green jumpsuit.

Q Indicating the defendant for the record. When you had gone out on September 17th of 2003 were you aware there was a warrant out for Mr. Corley's arrest on a local matter?

A Yes, I was.

Q And were you aware that that local matter was for a violation of the Uniform Firearms Act, correct?

A I was.

Q Now, were you also aware and I don't know whether you [29] received the information or Agent Roselli, but were you aware that there was some information received that Mr. Corley may have been involved in a bank robbery in Norristown, Pennsylvania?

A Yes, I was aware of that.

Q And after Mr. Corley was arrested did you see whether he was injured or anything?

A Yes, he did have a minor cut.

Q Okay. And do you remember where that was?

A I want to say on one of his arms but I'm not – not sure.

Q Okay. After he was arrested what if anything did you do, did you go to the hospital with Mr. Corley or where did you go?

THE COURT: Just let him answer the question, what did you do when he was arrested.

THE WITNESS: When he was arrested he went back to his car or he was placed in a local police car so he could be transported. I actually went to talk to some of the neighbors to see if they had any information on Mr. Corley himself or any information that would lead – would further our investigation.

BY MS. MANN:

Q Okay. And at some point, Trooper D'Angelo, you came in contact with Mr. Corley later that afternoon, correct?

[30] A That is correct.

Q Okay. And that was about 3:30 p.m. on the same day?

A Yes.

Q Okay. Could you tell us what happened when you saw Mr. Corley again that afternoon and who were you with?

A At the time I was with Agent Roselli. This meeting took place in the FBI Office at Sixth and

Arch. Mr. Corley was brought in, there was some small talk about, you know, if he was okay, you know, he was provided a drink and he was provided some chips to eat. And then we went into why we wanted to talk to him.

Q When you say you asked him if he was okay, what if anything did he say?

A He said he was okay.

Q And he ate the food?

A Yes.

Q Okay, continue.

A We explained to him that I was investigating a bank robbery and Agent Roselli was also investigating that same bank robbery and that happened in Norristown back in June. And that, you know, we had information that he was involved. We explained to him the possibility of earning a 5(k) motion but we specifically told him that we could not make him any promises. And then after explaining all that to him we went ahead and advised him of his rights.

[31] Q Okay. So while you're talking to him, you're not asking him any questions?

A No, we're talking at him, we're explaining, hey, this is what can happen.

Q Did you ask him any questions?

A No.

Q Okay. You said you went on to advise him of his rights. I'm going to show you what I've marked as Government Exhibit No. 1.

MS. MANN: May I approach?

BY MS. MANN:

Q Do you recognize this document?

A I do.

Q Could you tell the Court what it is?

A It's advice to rights form.

Q Is it related to any specific case?

A Yes, it's relating to the bank robbery case.

Q Okay. And could you tell us, while you're sitting there, was that advice of rights read to Mr. Corley?

A It was.

Q Okay. And this was prior to asking any questions, correct?

A Yes.

Q Could you tell is that what – who read it and what does it say?

[32] A Agent Roselli read it. Would you like me to read it?

Q Yes, I would.

A Okay. It starts out advice to –

THE COURT: I have it in front of me, you don't have to read it.

MS. MANN: Okay.

BY MS. MANN:

Q After these advice of rights were read to the defendant, Mr. Corley, what if anything happened after that?

A Agent Roselli passed the form to Mr. Corley, Mr. Corley appeared to look over it and to reread it himself and then he signed his name, Agent Roselli signed his name and handed the form to me and I signed my name.

Q During the reading of this advice to rights did Mr. Corley appear disoriented, unable to understand, anything, tell us what you observed of him or what he said when the rights were being read?

A Yeah, Mr. Corley appeared to understand what was going on, I didn't notice any problems he was having following our conversation or as far as the advice to rights.

Q Did he have any questions?

A No.

Q And from your time with him he appeared to read this document, he didn't say he couldn't read it right or anything like that?

[33] A No.

Q You said earlier that you talked to him about the possibility of a 5(k). There were no promises made to Mr. Corley, correct?

A That was explicitly –

MR. COOPER: I'm going to object, your Honor, to the leading nature of the questions at this point because –

THE COURT: Sustained.

MR. COOPER: – we're getting into the critical area.

THE COURT: Well, he's already answered it from before but go ahead, rephrase the question.

BY MS. MANN:

Q What if anything did you tell the defendant would be done if he gave a statement or cooperated, did you say anything –

THE COURT: Wait a minute, just stop right there.

Got the question?

THE WITNESS: I got it, your Honor.

THE COURT: Go ahead.

THE WITNESS: We explained to Mr. Corley that if he chose to cooperate there was a possibility he could earn a 5(k) motion which would allow the sentencing judge to downwardly depart from the sentence that the book would impose on him for this specific crime.

We specifically told Mr. Corley that the 5(k) motion [34] allows the judge to do that, however it doesn't require the judge to go down. So the judge would be free to say, yes, that's very nice you cooperated but you're still getting this sentence. We also specifically told him we could not make him any promises because it's ultimately up to the judge as to what he could get. So, no, we couldn't, there are no promises.

BY MS. MANN:

Q How did the interview end, what happened after –

A After Mr. Corley had discussed his involvement in this case –

Q Could you tell us what he said, what if anything did he say?

A Mr. Corley said that, yes, he did participate in the bank robbery on June 16th of 2003 at the credit union, which is the Norrisco Federal Credit Union located on grounds at Norristown State Hospital. He told us that he and a gentleman named Gregory Wilson and Eugene Butler were the ones involved in this bank robbery. He explained that they had

planned it a couple days earlier so it was not a spur-of-the-moment thing. It was Mr. Butler's idea to go out and to – I'm sorry, it was Mr. Wilson's idea to go steal a car, so they stole a car from a train station and they went into Norristown where they obtained a pillow – Mr. Butler obtained a pillowcase from his father's house. And they went, Mr. [35] Butler and Mr. Wilson went in, got disguises, got fake facial hair and then they proceeded to rob the bank using this stolen maroon Dodge Caravan.

After doing the robbery and in the robbery Mr. Corley says that he does have a gun while they're inside the bank. Mr. Corley says he takes the video surveillance tape from inside the bank and they get approximately 48 – $45,000 from the bank because his cut is about $15,000.

Afterwards they dump the stolen vehicle in Norristown and then they leave. And, to answer your question, the interview ends at that point. We said: okay, well, we'd like you to write this down for us. Mr. Corley said: you know, I'm getting a little tired now, could we do this tomorrow. We said sure, so the interview was concluded.

Q Okay. Do you remember approximately what time the interview was concluded?

A The interview was concluded about 6:35, 6:40 p.m., so 6:38 I think is the time we used.

Q So nothing was written down that day?

A Other than the advice to rights, that's correct.

Q What if anything did you determine from his demeanor, Mr. Corley?

A Mr. Corley appeared to be straightforward, he appeared like a half – a decent guy who's trying to do the right thing.

[36] Q You had interviewed witnesses from the bank I believe prior to talking to the defendant that day, correct?

A That is correct.

Q Did any of the intimate details the defendant gave you on that day match some –

MR. COOPER: Objection to the characterization, your Honor.

THE COURT: All right, rephrase it. Well, was what he said consistent with what you had heard before?

THE WITNESS: It was, your Honor.

THE COURT: Okay.

MS. MANN: I have nothing.

THE COURT: Mr. Cooper.

CROSS-EXAMINATION

BY MR. COOPER:

Q Trooper D'Angelo, good morning.

A Good morning.

Q In the morning in Sharon Hill you stated that on that morning you were aware Mr. Corley was a suspect in an armed bank robbery at the Norrisco Credit Union, you were personally aware that he was a suspect?

A I was.

Q So was Agent Roselli, is that correct?

A I believe he was.

Q And so was Agent Turner, is that correct?

[37] A I don't know if – if Investigator Turner was aware of that or not.

Q Now, you saw Mr. Corley in handcuffs and when you saw him in handcuffs he was in a local police car. And when you say local, that's a Sharon Hill, is that Sharon Hill Township police car or –

A I had originally saw him where he was stopped.

Q Oh, okay.

A And then I did speak with him in a local, a Sharon Hill, I think it was a Sharon Hill Borough Police Officer's car.

Q Okay. A local police station which was about, what, five blocks away from where he was arrested?

A No, I saw him in a police car out at that scene where he was apprehended.

Q Okay. And then did you go to the police station?

A No, I did not.

Q Now, this time that you saw him in the police car was early in the morning. When I say early, somewhere around 8:00 o'clock, 8:30 in the morning, is that fair to say?

A That's fair to say.

Q Now, you said under direct examination that the next time you saw Mr. Corley was at 3:30 in the afternoon at the FBI building at Sixth and Arch, am I correct to say that?

A After he leaves that scene that is the next time I see him.

[38] Q Okay. Now, as far as what happened between the time you saw him in the local police car and the time that he was seen again by you at the FBI Building at 3:30, you don't have any personal awareness of what transpired with Mr. Corley?

A Only through secondhand information where I was aware he went to the hospital.

Q All right, let's talk about that for a minute. Were you aware that he went to the hospital at about 11:45?

A At that – I knew he went to the hospital on that day, I wasn't sure exactly when he was transferred to the hospital.

Q Okay. Were you aware that he was discharged from the hospital about 3:20 p.m.?

A I was aware around that time, yes.

Q Now, he was treated with stitches to his hand, about five sutures for a cut?

A I think that's accurate.

Q He was also given painkillers and a sedative, is that also true?

A I am not aware of him getting any sedatives.

Q Okay. Did he ever say that he was on a sedative or on any painkillers?

A He may have said he was on pain medication or Tylenol, there was no medication that raised any alarms to me. Well, I don't recall specifically what medication he said, but had he said Tylenol that would not have raised an alarm. [39] Had he told me a high powered medication then I would have taken note of that.

Q Did you check with the hospital or –

A I did not.

Q – did Agent Roselli check with the hospital?

A Not that I'm aware of.

Q Were any medications transported with Mr. Corley from the hospital?

A I'm not aware of any.

Q Now, at 3:30 when you were with Agent Roselli there is what we describe as small talk, I think that's what was said earlier was small talk. And from there there was some refreshments given and then he was told, he, Mr. Corley, was told that you were investigating a bank robbery and you had information that he had participated in the robbery. That was told to him by one of you, is that fair to say?

A Yeah, during the progression, yes.

Q Well, there's some small talk, are you okay, that kind of conversation?

A That kind of conversation, hey, listen, you're under arrest right now because there's a Philadelphia warrant out for you.

Q Okay.

A You're under arrest for that.

Q All right.

[40] A I'm investigating a bank robbery, you're not under arrest for that but, you know, we're going to want to talk to you about that.

Q Okay. And that was really the reason to get him to FBI, wasn't it, was to talk to him about the robbery, wasn't it?

A Well, actually by that point he was in custody, he was also in custody for assaulting a Federal Officer so –

Q Okay.

A – he was going to have to go there anyway.

Q All right, so there was a complaint filed and a warrant for arrest for that charge, is that right?

A Right. So that's why he would not have been turned over to the city at that point.

Q No, but he was under Federal arrest, is that right?

A That's my understanding, yes.

Q For the incident –

A For the assault.

Q – of the assault?

A Right.

Q It's also true that when someone's arrested federally for an incident like that, they're to be taken before a magistrate as soon as possible to be advised of the charges against them, aren't they?

A I'm a State employee, I –

Q You don't know anything about that?

[41] THE COURT: Different pay grade.

MR. COOPER: Different what?

THE COURT: Pay grade.

(Laughter.)

THE WITNESS: Very different.

BY MR. COOPER:

Well, let me ask you this, let me ask you this: at any time in the afternoon from 3:30 or when you first saw him at 3:30 was Mr. Corley taken before a Federal Magistrate to be advised of the complaint against him for the assault of the Federal Officer, did that happen?

A Not – not on the 17th of September, no.

Q Did it happen – well, let's just stick with the 17th for right now. Instead what happened was you stated your desire to Mr. Corley that you wanted to question him about his participation in this bank robbery, is that a fair statement?

A Yes, we al – yes.

Q Now, you told Mr. Corley you had information that he had been involved with the robbery, is that correct?

A Yes.

Q Did you say anything else other than information, did you disclose the nature of that information, a name, a photograph, any type of evidence that you had that would indicate that Mr. Corley was a suspect? Did you tell Mr. Corley any of that?

[42] A I did not tell him any name of any person who would have said he was involved. I may have shown him sketch, I'm not –

Q I'm sorry?

A I may have shown him a sketch but –

Q A sketch?

A But I'm not sure. That would have been the only evidence that I would have shown him.

Q When you're talking about sketch, are you talking about like an artist's sketch of a suspect?

A Yes.

Q And is that, if it was a sketch it would be purported to be him, him being Mr. Corley?

A It may have been, it could have been any one of the three guys.

Q All right. Now, this conversation about the 5(k) I want to ask you about that now. Okay? This is what I wrote down: "He was told he could earn a 5(k)," right?

A Right.

Q And you said that there were no promises, that's what you stated earlier?

A Exactly.

Q Did you promise him that you would tell the prosecutor that he cooperated and that you would tell the judge that he cooperated to try to convince the judge to lower Mr. Corley's sentence at the time of sentencing, did you promise to do [43] that?

A I did not, no. I think what was explained to him, as I stated earlier, was, listen, if you get this 5(k) motion where you have cooperated with the Government and you get this 5(k) motion, you know, the Government will present the motion to the judge and the judge will be free to downwardly depart from the sentence.

Q But you told him how he could get the 5(k) motion, right? You told him that?

A Right, you know, if he cooperated and his cooperation turned out that he was honest the whole way then yes.

Q Okay. And by cooperation that would be admitting that he was involved and whoever else was involved and describing the details of what happened, is that right?

A I think if you're cooperating you cooperate a hundred percent, you don't do it 50 percent.

Q And you explained all that to him, is that right?

A Yes.

Q And in order to get the 5(k) if he's talking to you about his involvement you've got to be able to tell somebody else about what he said to you, is that correct?

A I'm not sure what you mean.

Q Well, in order for him to earn the 5(k) you have to tell somebody what Mr. Corley did to earn the 5(k), you would have to tell them what he said and how useful it was, is that a [44] fair statement?

A Right, all the reports would get turned over to the appropriate prosecuting agency.

Q And it would also be fair to say you promised you would do that when you said to Mr. Corley: if you talk to us, this is what we'll do for you. Isn't that a fair statement to say?

A I think we've always told – I've always told people, listen, if you cooperate, your honest, you know, call me up as a witness and I'll testify honestly –

Q Okay.

A – as to what you did.

Q Okay. So, you know, with all due respect, it wouldn't be fair to say there were no promises. I mean there were promises?

A I would disagree with your characterization there. I would say anybody can call me up as a witness and I will always honestly testify as to your level of cooperation, your lack of cooperation. That's – I don't see that as a promise. If you do then maybe we just – I want to avoid semantics here.

Q Did you ever call Ms. Mann, the prosecutor on the case, during this interview from 3:30 to 5:00 o'clock?

A I personally did not, I'm not sure if –

Q Did Agent Roselli call?

[45] A I'm not sure if Agent Roselli did or not, but I can tell you I did not and I did not talk to her.

Q Agent Roselli was with you the entire time of the questioning?

A He did step out occasionally but for the most part he was there.

Q Okay. And he has a cellphone to use?

A Yes, he does.

Q Okay.

A And there would have been a phone outside the room, also.

Q It would be a phone that would be used while Mr. Corley was present?

A It – it's a small room right outside the room is a phone.

Q Well –

A But the phone is not in that room, that's correct.

Q We're speculating. Do you recall Agent Roselli using a cellphone to call Ms. Mann during the time that Mr. Corley was being interviewed is the question.

A I do not.

Q Now, this advice of rights form that you – was Government Exhibit 1, this is the one that is dated from the 17th?

A Yes.

THE COURT: I only have one that's dated the 18th.

[46] MS. MANN: I can provide the Court with a copy, there's two of them. There's one where Agent D'Angelo is present and there's one where Special Agent Heaney's present. Heaney's present on the 18th, D'Angelo's present on the 17th. I mailed a copy up to the Court.

THE COURT: Go ahead.

BY MR. COOPER:

Q Trooper D'Angelo, you testified earlier about an advice of rights form and you were shown that advice of rights form and you testified about that advise of rights form. But you weren't present for that advice of rights form that you just – that you testified about today, is that right?

A No, I was present.

Q You were present?

A I was not present on the 18th, the Government Exhibit 1 is the 17th.

Q Okay. So the Judge has what's on the 18th?

THE COURT: I don't have it because it's attached to your motions.

BY MR. COOPER:

Q Okay, all right. On this 9/17 advice of rights form at 5:07 where it has "You have the right to remain silent, anything you can say – say can be used against you." Did you ever tell Mr. Corley that during the time you were questioning him and during the time that this questioning [47] would take place to try to get this 5(k) that his statement would be off the record, did you tell him that?

A No.

Q Never?

A No.

Q You said the statement would be turned over for purposes of prosecution if it was given?

A We read him – we read him the rights. And in the rights it specifically says whatever you say could be used against you.

Q Okay. Now, I noticed that there is a signature at the bottom. Is there any writing after these statements of rights to indicate yes or no or initials or anything like that in this document, there's nothing there, is that correct?

A That's correct.

Q Isn't that the procedure though, isn't the procedure to have the suspect acknowledge the rights individually through some sort of initial or signature or acknowledge it? Isn't that the procedure for questioning?

A I'm not aware of how the FBI does it, whether they have t hem initial each one. I can tell you in my personal experience that, no, there's one signature on the State form, they do not individually sign off on each specific advice.

Q Now, you said nothing was written down that day, no notes [48] were taken by anybody?

A No.

Q There were notes?

A I don't believe I took any notes and I don't believe, well, I'm not sure if Agent Roselli did, but I did not. But I can tell you when I went back to the station I wrote down, you know, what I had him – what I recall having him said.

Q Okay, so you made notes later of your recollection of the conversation?

A Yes.

Q And you still have those notes?

A They would have been incorporated into the police report.

Q Okay. And when you say police report are you talking about the typed summary of the statement or –

A I'm talking about the State Police police report.

Q The State Police report?

A Yes.

Q Now, it indicates here that when the interview began it was 3:30 and that the advice of rights was afforded at 5:07 – I'm sorry, 3:50 it says commenced interview and the advice of rights was given at 5:07, that's the log that I have. Do you agree with that?

A I agree with that.

Q Okay. And you're saying that between 3:50 and 5:07 what [49] was covered was this discussion about the 5(k) and the reading of the rights form?

A 5:07 is the reading of the rights form.

Q Did Mr. Corley say anything at this time when you were talking with him about the 5(k), did he say anything to you?

A I think he asked, you know, how it would work.

Q Okay. Was it explained how it would work?

A Yes, as I previously testified.

Q Okay. Did he ever indicate that he wanted a lawyer first before going further?

A No.

Q Did he ever indicate that he wanted to call his family first before going further?

A No.

Q Did he ever indicate that he wanted to stop before going any further?

A No.

Q The statement on the 17th it says on the log begins at 5:27 and concludes at 6:38?

A Okay.

Q Now, this is the portion that is not written down?

A Correct.

Q And this is about the bank robbery, was it about anything else?

A I think we discussed him, the assault on the Federal [50] Officer, too, but it was predominately in reference to the bank robbery.

Q All right. And during the questioning at the bank, about the bank robbery, counsel asked you, you had police reports and witness statements and you had done investigation concerning this robbery, is that correct?

A Yes, the investigation was well underway by this point.

Q Okay. So you were aware of the circumstances under which the robbery took place, the actions of the participants.

A Yes, I was.

Q Okay. And you were aware of the cars that were being used, is that correct?

A I was aware that there was a maroon Dodge Caravan involved in the actual robbery, it was used to get to the scene and to drive from the scene.

Q And that it was stolen to do that?

A And that it was stolen. I was aware there was a white vehicle, possibly a white van –

Q Okay.

A – that was seen where the maroon Dodge Caravan was left and possibly could have been the vehicle into which the actors fled further.

Q Okay. And the names Butler and Wilson you were also aware of as suspects, true?

A I don't think I was aware of Butler at that point, but I [51] was aware of Wilson.

Q And when you say you were not aware of Butler, are you saying that the name Butler, either the first name and the last name, were never

mentioned to you during the course of this investigation prior to September 17th?

A It's around there but I'm not sure if it's beforehand or afterhand.

Q Would you agree that it could have been beforehand?

A It could have been but I'd have to look at the report to see exactly what date I found that out.

Q Okay. Now, the – when Mr. Corley said he wanted to stop that evening, okay, that's when everything stopped and Mr. Corley was taken to the Federal Detention Center –

A Yes.

Q – is that correct?

A That is correct.

Q And then he returned the next morning at about 10:30, is that correct?

A That's my understanding. I did not return the next day.

Q Okay. So you were not present during that particular second offense, is that what you're saying?

A Correct, I was not in Philadelphia on the 18th.

MR. COOPER: Okay. May I have a moment, your Honor?

(Pause.)

MR. COOPER: That's all I have, your Honor.

[52] MS. MANN: I have brief redirect.

REDIRECT EXAMINATION

BY MS. MANN:

Q Trooper D'Angelo, you testified that Tylenol wouldn't have raised any concerns if the defendant told you he had taken Tylenol. Would Motrin have raised your concern?

A No.

Q Okay. Did you ever during that interview tell the defendant who decides whether a 5(k)(1) motion will be filed?

A I don't think so.

Q Did you ever – did you tell him that you and Vito Roselli decides if that –

A Oh, no.

Q On cross-examination you were asked about a white van. Tell us what if anything the defendant told you about a white van in his statement if he told you anything at all?

A He said that he did not want – he owns a black Jeep. He did not want to bring his black Jeep into Norristown to do this robbery because people in Norristown were familiar with that black Jeep and

they knew that that's the vehicle he drove. So he used his wife's minivan which is a white minivan to drive into Norristown that day because he didn't want a connection to be made between him and this bank robbery.

Q Trooper D'Angelo, did you receive information from either [53] Agent Roselli or anyone that the defendant was laughing and joking with other agents at the hospital while he was waiting to see the doctors?

A Yeah, I'm not sure of their names but the two agents who brought him back from the hospital were saying, you know, he's doing, you know, he's doing fine, he was jovial and laughing with us, he's – no problems.

MS. MANN: Your Honor, I have nothing further. I would ask that Exhibit 1 be moved into evidence.

THE COURT: Wait until you're done. Do you have any more questions of this witness?

MR. COOPER: Just one followup.

RECROSS-EXAMINATION

BY MR. COOPER:

Q Did you tell Mr. Corley that you and Agent Roselli would decide if his assistance was substantial enough to tell the prosecutor about it so that a

decision could be made about a 5(k), you told him that much, didn't you?

A Oh, we told him we would relay his – we told him we would relay his whatever he told us that day to the prosecutor.

Q Did you tell him that you would decide then whether his assistance was good enough?

A No.

Q You would just report what he said and let somebody else [54] decide it, is that what you would say?

A No, we would bring his – we would bring the entire case to the, in this case the United States Attorney's Office and say, look, this is the facts as we know them from the witnesses, from the victims, this is what Mr. Corley's saying, you know, and then look and see how they jibe or look and see how they don't mesh.

Q But didn't you tell Mr. Corley you're part of that decision-making process? You had to have told him that.

A Not the decision-making process, that we would bring that information to the United States Attorney's Office.

Q Okay. I mean I guess I'm having a little trouble, I mean you guys are the investigators in the case, right?

A Right.

Q You and Agent Roselli, I mean you're out there digging around looking for information, right, you're familiar with all the facts and all the particular hangups with the case and all the different things that occur with the case, right? Isn't that fair to say?

A I think that's fair to say.

Q Wouldn't it be fair to say that you're in the best position, you and Agent – you guys would be experts in the factual investigation of the case to be able to make a judgment about somebody's level of cooperation and the degree to which that cooperation had helped you. Isn't that a fair [55] statement?

A Maybe it's a fair statement but I don't think that's how the system works. There's a lot of things out there that I think it would be easier if the police were empowered to do but it doesn't work that way.

THE COURT: This is degenerating into a philosophical –

MR. COOPER: Yes, I'm going to get off of that. I'm going to get off of that.

BY MR. COOPER:

Q I guess all I'm trying to get at is in terms of talking to Mr. Corley, okay, it would be fair to say that you wanted him to confess to the robbery, isn't that a fair statement?

A Absolutely.

Q And that was your purpose in questioning him, correct, to obtain the confession?

A That was my chief purpose in talking to him.

Q All right. And you would have to talk to Mr. Corley about the fact that if he gave a statement this is what would happen to him, if he gave a statement, is that correct? This is what would happen if he gave a statement, you would tell him the result of that?

A I'm not sure I follow you.

Q I'll clarify the question. You told Mr. Corley that if he cooperated and if he gave a statement it would help him, [56] did you say that?

MS. MANN: Objection. This is – we've been through this.

THE COURT: Overruled.

BY MR. COOPER:

Q Did you tell him that?

A If he wanted to earn the 5(k) motion, yes.

Q Well, that's not the question I asked though. The question I asked is did you tell him that if he cooperated and he gave a statement it would help him?

A I don't think I phrased it that way. We phrased it if you want – you have two choices here, you can – two valid choices, in my opinion. You have the ability to cooperate 100 percent and possibly earn

a 5(k) motion. You have the option to say no, I'm not cooperating at all, prove it in court. And you have the third choice which you have half-hearted cooperation. I tell people I talk to that third choice is not a good choice. I would tell you cooperate fully or don't cooperate at all, you go to trial and make the Government prove its case. But in regards to your question, if you want to cooperate, you should cooperate fully and possibly earn that 5(k) motion.

Q It would be fair to say that that's what you wanted him to do, right?

A Absolutely.

[57] Q And that in order to get him to do that you had to tell him about the 5(k), right?

A I think it's a useful tool, I don't think I – whether I had to or didn't have to.

Q On the 18th did you see Mr. Corley at all on the 18th?

A I'm not in Philadelphia.

MS. MANN: Objection, this is asked and answered.

THE COURT: Overruled.

BY MR. COOPER:

Q I'm sorry, you didn't?

A I did not, I'm not in Philadelphia.

MR. COOPER: That's all I have. Thank you.

MS. MANN: I have nothing.

THE COURT: All right, thank you. You may step down.

(Witness excused.)

THE COURT: Who's your next witness?

MS. MANN: Special Agent Stephen Heaney.

THE COURT: All right, go get him.

MS. MANN: Your Honor, I ask that Exhibit 1 be marked and moved into evidence.

THE COURT: Wait until the end of your case.

MS. MANN: Your Honor, I just don't to (inaudible).

THE COURT: I won't forget.

MS. MANN: Agent, you have to step out.

[58] THE COURT: Well, he can stay in.

MS. MANN: Thank you.

THE COURT: He's already testified. Sit down at the table.

MS. MANN: There was a sequestration.

THE COURT: But only after he's testified it's over.

STEPHEN J. HEANEY, Government's Witness, Sworn.

THE COURT CLERK: Please state your name for the record.

THE WITNESS: Stephen J. Heaney, H-e-a-n-e-y.

THE COURT: Proceed.

DIRECT EXAMINATION

BY MS. MANN:

Q Agent Heaney, it's Heaney or Heaney?

A Heaney.

Q Heaney. Where are you currently employed?

A At the Federal Bureau of Investigation.

Q And how long have you been employed there?

A Approximately 12 years.

Q Okay. And you're assigned to squads in the FBI, correct?

A Yes.

Q Okay. And you're in Squad 10, is that correct?

A Yes.

Q Could you generally just explain what your duties and responsibilities are in Squad 10?

[59] A Squad 10 is a bank robbery squad. We also handle violations of kidnapping, fugitives.

Q Directing your attention to September 18th of 2003 where were you working at approximately ten-something in the morning on that day?

A I was working at our office at 600 Arch Street.

Q And were you with Agent Roselli?

A Yes, I was.

Q Were you present for an interview on that morning?

A Yes.

Q Okay. Could you tell us who that interview was with?

A The interview was with the defendant sitting at the table over there.

Q And who was present during that interview?

A Myself and Vito Roselli.

Q Could you tell us what happened during that interview, what if anything happened?

A Basically we sat down in a room, one of the rooms adjacent to our processing area in our office. I sat down with Mr. Roselli, the defendant, Mr. Roselli explained to him that he wanted to take a written statement from him regarding a bank robbery. And

before doing so he wanted to read him his rights again. Mr. Roselli read him his rights, the defendant understood his rights, waived his rights, signed the piece of paper and then Mr. Roselli commenced with the [60] interview.

MS. MANN: Your Honor, I'd like to show – approach the witness and show him what's been marked as Government Exhibit No. 2.

THE COURT: Is that the 1018, advice of rights confession?

MS. MANN: Yes.

THE COURT: Okay.

MS. MANN: May I give that to him?

THE COURT: Go ahead.

BY MS. MANN:

Q Could you just identify this document?

A Yes.

Q Could you tell us what it is?

A This is advice of rights document that was read to Mr. Corley.

Q And you were present for that reading?

A Yes, I was.

Q Okay. What happened after the reading of the advice of rights on September 18th?

A After the rights were read the defendant signed the advice of rights, waived his right to the attorney. Mr. Roselli signed it as a witness, I signed it as a witness and then Mr. Roselli took a statement from the defendant.

Q Okay. Could you tell us when you say he took a [61] statement, what happened specifically, do you recall?

A Yes, he wanted to take a witness statement. He asked the defendant if the defendant wanted to write it or he would write it in his words. So the defendant allowed Mr. Roselli to write it. The defendant told him what had happened – excuse me – and Mr. Roselli wrote it down. Encompassed the front page, bottom, the second page, and then after Mr. Roselli wrote down the statement Mr. Corley, the defendant, looked at it for accuracy, signed it, dated it and Mr. Roselli signed again and I signed again as well.

Q Was the defendant responsive to questions that Agent Roselli asked in clarifying what had happened during the bank robbery on June 15th of 2003?

A Yes.

Q Did he appear not to understand what was going on?

A No.

Q Other than confessing to the bank robbery on June 16th, 2003, did the defendant say anything else, did he apologize?

A Yes, he did.

Q Okay. Did you or Agent Roselli force or threaten the defendant during this interview?

A No.

Q Okay. How long approximately did the interview last?

A My recollection is around 20 minutes.

Q Any more than that?

[62] A Pardon?

Q Any more than that?

A I don't recall it being any more than that, no. I don't recall being in that room more than a half hour, in the, I should say, the whole processing area.

Q Did anyone make the defendant any promises during that interview?

A No.

Q Okay. Did the defendant get anything to drink, if you recall? If you don't recall . . .

A To my recollection a can of soda.

Q Okay. During that interview did you tell the defendant whether the interview or the confession would be off the record?

A No.

Q If the defendant had asked for a lawyer during the interview would you have stopped the interview?

A Yes.

Q Agent Heaney, you testified you've been in the FBI for over ten years. If a prisoner is arrested, are they taken to the police station or are they taken to the hospital, what's the procedure?

A Well, that all depends. I've been involved in many arrests where these things were done at the arrest, we bring the individual back to our office for processing. If an [63] individual is injured and wounded and requires medical attention then we would take that person to the hospital.

MS. MANN: I have no further questions at this point.

THE COURT: Mr. Cooper.

MR. COOPER: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. COOPER:

Q Good morning.

A Good morning.

Q September 18th when you come there are you familiar with a logsheet that was written regarding the interview on the 18th, are you familiar with that in the FBI 302's, have you seen that?

A Actually I've seen it, yes.

Q Okay. Do you have it with you?

A No, I don't.

MR. COOPER: Can I show it to the witness, your Honor, may I approach?

THE COURT: Show it to Ms. Mann first.

MR. COOPER: For purposes of identification I can mark this as Defense 1 and I'll show it to the witness.

BY MR. COOPER:

Q Agent Heaney, could you just look at the bottom here and then flip over to the next page, note that the document [64] speaks for itself but just notice what's there.

A Okay.

Q Okay. Does that refresh your recollection as to the logged sequence of events that took place on the 18th?

A Yes.

Q Okay. Now you've been an FBI Agent for about ten years, is that what you said?

A I started in '91, so over 12 years.

Q Okay. And during that time you've participated in lots of arrests of people and lots of processing of individuals, is that correct?

A Yes.

Q And part of that processing on Federal charges is to take people to Magistrate's Court to have them answer or be advised of the charges that are pending against them, is that fair?

A That's correct.

Q Now in this particular case as far as what we're aware of the circumstances here, and tell me whether you agree with this or not, Mr. Corley was arrested on the 17th of September at about 8:00 o'clock in the morning, is that correct?

A I'm not sure. I was not there for the arrest.

Q He was taken to the hospital, are you aware of that, on the day before?

A I have heard that but I was not there so I don't – I'm [65] not a hundred percent on that.

Q Are you aware he was questioned the afternoon before?

A Yes.

Q Okay. And the questioning began about 3:30 that particular day, on the 17th I'm referring to now.

A I know that from what I see in the log, correct.

Q Now, you would agree with me the court was open that day on the 17th, Federal Court, is that correct?

A I don't know, I was out of town that day so I don't know if court was open that day or not.

Q Okay. Would you have any reason to disagree if I said court was open that day?

A No.

Q And part of that court process is that a magistrate sits to hear cases in Federal Court, is that correct?

A That's correct.

Q And that's for people to make their initial appearance before a Federal Magistrate to be advised of charges pending, is that correct?

A Yes.

Q And that has to be done pursuant to a Federal Rule of Criminal Procedure which is Rule 5(a), I believe, is that correct?

A That's my understanding.

Q And part of that process is also that if a Magistrate is [66] not available that the person be advised of their charges before a local judicial authority as well, is that correct?

A I believe so.

Q That wasn't done as far as you know on the 17th of September, correct?

A Not aware of that.

Q I'm sorry?

A I'm not aware of that, I don't –

Q If I said to you it wasn't done would you have any reason to disagree with that?

A No.

Q And as far as the 18th is concerned which would be the next day, that would be a Thursday, I believe, would you have any reason to disagree the court would not be open that day as well? Let me rephrase it.

A Rephrase that.

Q If I said court was open on the 18th do you have any reason to disagree with that?

A No.

Q Okay. And there would be a magistrate sitting as well, is that correct?

A Yes.

Q And on the 18th, if memory serves us, Mr. Corley was received at 10:30 a.m. from the U.S. Marshals, is that correct?

[67] A Yes.

Q That means he was transported from the FDC over to FBI by Marshals, is that correct?

A True. He would have gone from the FDC to this building here, to the Marshals.

Q Okay.

A And then would have been brought from the Marshals to our office but essentially that's – that's correct.

Q And he was not taken before a magistrate at that particular time, is that correct?

A That's correct.

Q And on Thursday morning as far as you are familiar with your experience in Federal Court on Thursday mornings magistrates conduct arraignments at about 10:00 o'clock that morning, don't they?

A Yes.

Q So people can be brought before a magistrate to be advised of charges that are pending, is that correct?

A Yes.

Q That wasn't done here though?

A No, sir.

Q Now, the reason that it wasn't done is because Mr. Corley, it was the desire of the FBI to question Mr. Corley concerning events concerning the bank robbery of which he was a suspect, is that also true?

[68] A Could you rephrase that?

Q Sure. The reason that Mr. Corley was not brought before a magistrate on the morning of 9/18/03 and that he was brought to the FBI was the FBI's desire, when I say the FBI I'm talking about you and Agent Roselli's desire, to question Mr. Corley concerning the events of a bank robbery that he was being investigated for, isn't that true?

A Yes.

Q Now, this statement –

MR. COOPER: I'm going to return to the seat, your Honor.

BY MR. COOPER:

Q The statement that you talked about which was I think Government 2 which is the written

statement following the advice of rights, I thin you have – do you have that in front of you?

A Yes, I do.

Q Okay. Now, did Mr. Corley ever say that before saying anything further that he wanted to call his family?

A I don't recall that.

Q Could have happened?

A It's possible, sure.

Q Did Mr. Corley say that he wasn't comfortable writing anything?

A I don't recall him saying he wasn't comfortable writing [69] anything.

Q Maybe I missed this and I'm sorry if I did. Did you ask Mr. Corley or did Agent Roselli ask Mr. Corley to write the statement?

A Mr. Roselli wrote the statement for Mr. Corley.

Q Okay. But was Mr. Corley asked to write the statement?

A I believe he asked Mr. Corley if he wanted to write the statement, yes.

Q Okay. Did Mr. Corley refuse to write a statement?

A No, he didn't refuse to write the statement, no.

Q Well, what happened, how did Agent Roselli come to write this statement?

A He wanted –

Q He –

A I'm sorry. The defendant wanted to give a statement, Mr. Roselli wanted it written, Mr. Corley allowed Mr. Roselli to write the statement and Mr. Roselli wrote the statement for Mr. Corley.

Q Okay. Now, when Mr. or Agent Roselli wrote the statement was this as a result of a conversation on Thursday or did Agent Roselli just write a statement?

A This was a result of the conversation at the moment.

Q At the moment. The sheet that has this written portion on it, you see that in front of you, is that correct?

A Yes.

[70] Q There's two pages here.

A Yes.

Q Was anything else written down, any other type of notebook by Agent Roselli or yourself?

A Not that I'm aware of. I did not take any notes, I did not write anything down. This is the only statement that I'm aware that was written.

Q And it was after that statement, according to the – to the log – do you have that in front of you? Because I'll show it to you again to refresh your memory if you don't have it.

A I do not have it in front of me.

Q Okay. Again I'm showing you what's been previously marked as (inaudible).

It was after this statement that we have on paper here that he was taken to Pretrial Services to be interviewed, is that correct?

A My recollection is Pretrial Services came to our offices and interviewed him prior to him being escorted back to the Marshals.

Q And the purpose of the interview, as far as you know, is for preparation of a report for the Magistrate for his initial appearance?

A Yes.

Q And it was then he was afforded his initial appearance in [71] the afternoon, is that correct?

A Yes.

Q But that was only after the statement was taken, is that fair to say?

A It was after the statement was taken, that is correct.

Q Was there any discussion on the 18th when you were present about a 5(k) or about any things that would happen as a condition of his statement?

A Not that I recall.

MR. COOPER: Nothing further, your Honor.

MS. MANN: Briefly, if I may.

REDIRECT EXAMINATION

BY MS. MANN:

Q Agent Heaney, if someone is willing to give a statement you're willing to take that statement, correct?

A Yes.

Q If someone wants to give a statement. If they are, if that statement is given at the end of a day and finished at approximately 6:38 are they able to be interviewed by Pretrial Services at that time?

A At 6:38 –

Q p.m., I mean.

A p.m., not that I'm aware of, no.

Q Now, the exhibit marked Government Exhibit No. 2, at the bottom of the first page Vito Roselli

writes: I, Johnnie [72] Corley, provide the following statement voluntarily. It is being written for me by Agent Roselli. It is my own words and I have not been threatened or coerced to provide the statement, correct?

A Yes.

Q Okay. And the defendant's statement appears on the first and second page as well, correct?

A That's correct.

Q Okay. Did the defendant during that limited time you were with him ever say he did not want to talk to you and Agent Roselli?

A No.

Q Okay. And is it unusual or what is the practice, is it unusual for agents to write the statement or do defendants normally write the statement or is it fifty-fifty?

A I've seen it either way.

Q You testified earlier that arraignments are done at 10:30, typically they're arraignments and initial appearances – excuse me, they're typically just arraignments, correct, on Thursday mornings at 10:30?

A Yes.

MR. COOPER: Objection, your Honor, that's not what he testified to.

THE COURT: It doesn't matter. Go ahead.

MS. MANN: I have no further questions.

[73] THE COURT: All right, go ahead.

RECROSS-EXAMINATION

BY MR. COOPER:

Q Well, counsel asked you about Pretrial Services, could somebody be interviewed by Pretrial Services at 6:30. I mean you weren't there the day before as far as participating in this interview process, is that correct?

A That's correct.

Q Okay. And as far as your understanding of the question of whether Pretrial Services is available, I mean as of 10:30 they're available in the morning, is that your understanding?

A Yes.

Q And even before that, is that correct?

A Yes.

MR. COOPER: That's all I have, your Honor.

THE COURT: All right, thank you.

THE WITNESS: Thank you, your Honor.

(Witness excused.)

MS. MANN: Your Honor, the Government has nothing, no further witnesses to call.

THE COURT: All right, let's hear some argument here.

MR. COOPER: I have a couple of documents to put into evidence, your Honor.

THE COURT: All right, let me see them.

[74] MR. COOPER: These are the hospital records. I have sent them to counsel.

MS. MANN: Do you want stipulation?

MR. COOPER: Yeah, I think we're –

THE COURT: All right, counsel's stipulating what?

MR. COOPER: Okay. The hospital records, in particular it's the Jefferson Medical – Thomas Jefferson University Hospital records. Mr. Corley was taken there and admitted on the 17th at 12:12.

MS. MANN: Your Honor, I would stipulate to the records could be moved into the evidence and then speak for themselves if the Court wants to review them.

MR. COOPER: I'm happy to do that.

THE COURT: Highlight, go ahead.

MR. COOPER: I highlighted what I thought was relevant.

THE COURT: He was there at the noontime?

MR. COOPER: He was there at noontime, he was discharged at 3:30, he was given Motrin and he was given Rethelex, which I believe is –

MS. MANN: Keflex.

MR. COOPER: Keflex.

THE COURT: Keflex.

MR. COOPER: Keflex which is an antibiotic.

THE COURT: Is there any indication that either of [75] those two medications are mind-altering?

MR. COOPER: No.

THE COURT: Okay.

MR. COOPER: No, there is no indication as to that, sir.

THE COURT: Go ahead.

MR. COOPER: There was treatment for five stitches to his right hand for one cut and he was discharged at 3:30, 3:20 in the afternoon.

THE COURT: Okay.

MR. COOPER: Okay, that's what the hospital records say. As far as – I'll hand them up to your Honor.

THE COURT: All right, thank you.

MR. COOPER: The – well, the other question has to do, I guess, with argument. This is pertaining to some statutes that I think are relevant in terms of the argument on the suppression but they're not really evidence –

THE COURT: That's correct.

MR. COOPER: – for facts.

THE COURT: So as far as we're concerned, that's the documents.

MR. COOPER: That's the documents, I just need one particular moment, if I could.

THE COURT: Go ahead.

(Discussion off the record.)

[76] MR. COOPER: With the admission of that document we would rest, your Honor.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	
JOHNNIE CORLEY	:	**Criminal No. 03-775**

MEMORANDUM AND ORDER

Schiller, J. **May 10, 2004**

Defendant Johnnie Corley is charged with various crimes related to an armed bank robbery in Norristown, Pennsylvania. Presently before the Court is Defendant's motion to suppress his oral and written confessions pursuant to Rule 5(a) of the Federal Rules of Criminal Procedure. For the reasons set out below, the Court denies Defendant's motion.

I. FACTUAL BACKGROUND

On September 17, 2003, at approximately 8:00 a.m., federal law enforcement agents attempted to arrest Defendant pursuant to a state-court bench warrant. (Suppression Hr'g Tr. at 19.) In the course of this arrest, Defendant had a physical altercation with an FBI agent while attempting to flee, and he was accordingly placed under federal arrest for assault on a law enforcement officer. (*Id.* at 40.) At approximately 11:45 a.m., Defendant was transported to Thomas Jefferson Hospital in Philadelphia to receive

medical treatment for injuries sustained during the altercation. At approximately 3:30 p.m., after receiving several stitches and being treated with Motrin and Keflex (*id.* at 74-75), he was transported to the FBI office for interrogation concerning the Norristown bank robbery, regarding which he was a suspect. (*Id.* at 39.) At approximately 5:27 p.m., Defendant signed a *Miranda* waiver and verbally confessed to the bank robbery. (*Id.* at 49.) When asked to write out his confession, Defendant stated that he was tired and requested to continue the following day. (*Id.* at 51.) The interrogation resumed at approximately 10:30 a.m. on September 18, at which time Defendant executed a written confession. (*Id.* at 59-60.) At approximately 1:30 p.m., Defendant made his initial appearance before a federal magistrate judge to be informed of his rights.

II. RULE 5(a) AND 18 U.S.C. § 3501(c)

Rule 5(a) of the Federal Rules of Criminal Procedure provides that "[a] person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge." FED. R. CRIM. P. 5(a). This Rule, along with the Supreme Court's rulings in *McNabb v. United States*, 318 U.S. 332 (1943), *Mallory v. United States*, 354 U.S. 449 (1957), and their progeny, provides that a confession obtained from a defendant during an "unnecessary delay" preceding an initial court appearance may be inadmissible. *See McNabb*, 318 U.S. 332 (holding, prior to enactment of Rule 5(a), that

confession obtained during excessive pre-appearance detention was inadmissible); *Mallory*, 354 U.S. 449 (interpreting Rule 5(a) to exclude statements obtained during eight-hour interrogation, which included lengthy polygraph test, prior to initial appearance). This general rule, however, has been statutorily circumscribed by 18 U.S.C. § 3501(c), which provides that "a confession made or given . . . while [the defendant] was under arrest or other detention in the custody of any . . . law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge . . . if such confession was made or given by such person within six hours immediately following his arrest or other detention." 18 U.S.C. § 3501(c). This subsection provides a "safe harbor" for law enforcement, setting a six-hour window within which otherwise admissible confessions may not be excluded solely on the basis of the defendant not having been brought before a magistrate judge. *See United States v. McNaughton*, 848 F. Supp. 1195, 1204 (E.D. Pa. 1994) (noting that where there is no allegation of constitutional violations, admissibility of confessions is governed by § 3501). Therefore, in the absence of any constitutional violations, the confession must be admitted if § 3501 is satisfied. *Id.* If § 3501 is not satisfied, the relevant inquiry becomes whether a pre-appearance delay was "unnecessary" for purposes of Rule 5(a). The question of what constitutes an unnecessary delay is discussed below.

III. DISCUSSION

The issues presented by the instant case are whether Corley's oral and written confessions, given nine and twenty-six hours respectively after his arrest, are within the time period prescribed by § 3501, and, if not, whether there was an "unnecessary delay" that could lead to the exclusion of either or both confessions. Regarding the oral confession, the Government argues that the time Corley spent in the hospital should be excluded from the calculation of time under § 3501.[1] Neither the parties nor the Court have located any Third Circuit or Eastern District of Pennsylvania precedent regarding this issue, so the Court looks to other federal jurisdictions.

Three circuit courts of appeals have held that time during which a defendant receives medical treatment is excluded from the calculation of time under § 3501. *See United States v. Aman*, 624 F.2d 911, 913 (9th Cir. 1980) (holding that post-arrest period spent by defendant in hospital for observation regarding dangerous condition did not constitute unnecessary delay); *United States v. Isom*, 588 F.2d

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[1] Incredibly, Defendant's supplemental brief asserts that he did not receive any medical care that delayed the processing of his arrest. (*See* Def.'s Supp. Mot. to Suppress Post-Arrest Statements.) The Court notes that Defendant's original brief regarding his motion to suppress sought to exclude his confessions *specifically* on the basis of his having received treatment in the hospital after his arrest. (*See* Def.'s Mot. in Limine to Suppress Post-Arrest Statements.)

858, 862-63 (2d Cir. 1978) ("The period during which appellant received medical treatment (at his request) . . . should not be counted in computing unnecessary delay."); *United States v. Haskins*, 536 F.2d 775, 778 (8th Cir. 1976) (upholding district court's denial of suppression motion where defendant spent much of eight-hour pre-appearance period in the hospital for injuries sustained during his arrest). Indeed, it could not have been Congress's intent in enacting § 3501 to force law enforcement officers to choose between providing an arrestee with requested medical treatment or obtaining an admissible confession, and there does not appear to be any caselaw that would support such a holding. Thus, this Court holds, in accord with the above-cited cases, that the time period during which Defendant was hospitalized prior to his appearance before a magistrate judge is excluded from the six-hour window provided by § 3501. Accordingly, the period of three hours and forty-five minutes during which Defendant received medical care must be subtracted from the nine-and-one-half hours between his arrest and his oral confession. Because the resulting time period is under six hours, § 3501 applies, and therefore Defendant's motion to suppress his oral confession under Rule 5(a) is denied.

Regarding Defendant's written confession, the Government argues that the time Defendant spent resting in prison at his own request should be excluded from calculation under § 3501. Regardless of whether § 3501 applies, it seems clear that a break from interrogation requested by an arrestee who has

already begun his confession does not constitute unreasonable delay under Rule 5(a). *See Isom*, 588 F.2d at 862-63 ("The period during which appellant received . . . overnight lodging [in jail] should not be counted in computing unnecessary delay."); *Gov't of Virgin Islands v. Gereau*, 502 F.2d 914, 923 (3d Cir. 1974) (holding that confession was admissible where defendant began statement and then "indicated he was tired [and] was allowed to sleep overnight before questioning resumed"); *United States v. Gibbons*, 437 F. Supp. 650, 653 (E.D. Pa. 1977) (holding that confession was admissible where defendant commenced confession after two hours of interrogation but was not brought before magistrate judge until thirty-six hours after arrest); *see also United States v. Manuel*, 706 F.2d 908, 914 (9th Cir. 1983) ("[P]olice provided Manuel with a meal and with sleeping accommodations so that he could regain sobriety. Although we do not sanction delay of any kind in bringing an accused person before a magistrate, delay engendered by such humanitarian motives can hardly be deemed unreasonable per se."). Thus, the period between Defendant's arrest and his written confession was not "unnecessary" for the purposes of Rule 5(a). Accordingly, Defendant's motion to suppress his written confession under Rule 5(a) is denied.[2]

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[2] Defendant originally moved to suppress his confessions on four grounds unrelated to Rule 5(a) and did not raise the instant issue until the suppression hearing. After the hearing, the Court ordered the parties to file supplemental briefs "regarding the

(Continued on following page)

IV. CONCLUSION

For the reasons set out above, Defendant's motion to suppress his oral and written confessions is denied. An appropriate Order follows.

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admissibility of a confession obtained from a prisoner while he was under arrest for a different offense for which he may not have been timely arraigned." (Order of Apr. 13, 2004.) Because the Court finds, however, that the instant confessions are admissible under § 3501 and Rule 5(a), the Court need not resolve the more complex issue of whether Rule 5(a) might be used to exclude a confession to a crime for which the defendant was not under arrest.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	
JOHNNIE CORLEY	:	**Criminal No. 03-775**

ORDER

AND NOW, this **10th** day of **May 2004**, upon consideration of Defendant's Motion in Limine to Suppress Post-Arrest Statements (Document No. 15), Defendant's Supplemental Memorandum of Law (Document No. 28), and the responses thereto, it is hereby **ORDERED** that:

Defendant's motion is **DENIED**.

BY THE COURT:

Berle M. Schiller, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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UNITED STATES OF AMERICA	:	CRIMINAL NUMBER 03-644
v.	:	Philadelphia, Pennsylvania
JOHNNIE CORLEY,	:	September 28, 2004 9:30 a.m.
Defendant	:	

. . . . . .

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE BERLE M. SCHILLER
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:

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– – –

FTR Operator: Christopher Campoli

Transcribed By: Donna M. Anders

– – –

Proceedings recorded by Electronic Sound Recording; transcript produced by computer-aided transcription service.

* * *

[48] MS. MANN: Your Honor, the next witness would be Special Agent Vito Roselli.

VITO ROSELLI, Government's Witness, Sworn.

COURTROOM DEPUTY: Please state your name for the record.

THE WITNESS: Vito D. Roselli, R-O-S-E-L-L-I.

DIRECT EXAMINATION

BY MS. MANN:

Q Agent Roselli, where are you currently employed?

A I'm with the FBI's violent crimes task force here in Philadelphia.

Q And how long have you been employed by the FBI?

A At this point just over seven years?

Q And are you assigned to – could you explain how the FBI works? Do you work all kinds of cases, or are you assigned to a special unit?

A The violent crimes task force if [sic] a task force of FBI and [49] Philadelphia Police Department. We investigate a number of crimes of violations, Hobbs Act, fugitives, kidnappings, extortions, and most specifically bank robberies.

Q How long have you been assigned to the violent crimes task force?

A With the exception of a six-month span, basically the whole time.

Q Okay. You received training from the FBI, correct?

A I did.

Q Could you just generally tell us some of the training you received?

A When you get your appointment to the FBI you're sent to the FBI Academy down in Quantico, Virginia. That's about a four-month program and they immerse you in different investigative techniques, and you spend a lot of time interviewing, interview techniques and learning about interview procedures.

Q Directing your attention to June 16th, 2003 were you involved in the initial investigation of the robbery at the Norsco Federal Credit Union?

A I was not.

Q Okay. At some point you did become involve, correct?

A I believe several weeks later.

Q And you learned about the bank robbery and you began – what did you do once you learned of the bank robbery?

[50] A When I learned of the bank robbery I got with trooper, now Corporal D'Angelo, who actually brought the information to me and just started looking at police reports and so forth, and educated myself on how the bank robbery occurred.

Q Okay. Now, I'd like to take you to September 17th, 2003. Were you working on that day in the morning?

A Yes.

Q Okay. And what time did you start working that morning?

A It was approximately 6:00 a.m. I set up a surveillance at 1318 Woodland Avenue in Sharon Hill, Pennsylvania.

Q And what was your purpose for going to Sharon Hill, Pennsylvania?

A I had learned that John Corley was residing at that residence or had been their at some past time. Previously to that, September 17th I had done several, what I call, drive-bys, just to see if there are any vehicles that I had learned that would be associated with John Corley.

I observed a white 2002 Dodge Caravan in front several times as I drove by the residence and that was –

Q I'm going to stop you there. I'm going to show you a photograph.

(Pause in proceedings.)

Q Did you take a photograph of a white van?

A I did.

[51] Q Okay. You said you noticed that there was a white van outside. While I'm looking for the photo – did you notice any other vans?

A There was – there was another mini-van across the street, I believe it was off-white. There are a number of vehicles, it was a residential area, they're twin homes on the one side, I believe on the other side they are twins or might be single-family homes.

Q I'm going to show you what has been marked as Government Exhibit 15. Can you tell me if you recognize what is in this photo?

A That is the 2002 white Dodge Caravan. It has a Pennsylvania registration of FDA 0555.

Q And were you able to determine the name this vehicle was registered under?

A Through the license plate I found it was registered to an Elizabeth McPherson at 1318 Woodland Avenue.

Q Were you able to determine what, if any, relationship she had to the investigation – whether she was related to anyone in investigation?

A Yes. She's the mother of Mr. Corley's children.

Q Okay. So you set up this surveillance to – in Sharon Hill to see if you saw the defendant. Why were you out there? Why did you set up the surveillance?

A To execute an outstanding warrant for Mr. Corley.

[52] Q Okay. And who were you working with on that day? Tell us who else you were with?

A Initially it was myself and Trooper D'Angelo, again now corporal. Members of the violent crimes task force were at another assignment. When they were done with that assignment, they came to my location in Sharon Hill and at that time I gave out assignments about who to set up where.

Q And you stayed out there for a while, correct, a little bit?

A I stayed out there for a while because at this time I noticed a black Jeep Cherokee behind the residence. I had learned that Mr. Corley drove a similar vehicle, a black Jeep Cherokee.

Q How long – at any point that day or that morning did you see the defendant in that area, Sharon Hill, Pennsylvania on Woodland Avenue? Did you ever see him?

A Yes.

Q Approximately what time?

A This was approximately 7:30, 7:45.

Q And could you tell the members of the jury where he was and where were you when you saw him?

A The – Woodland Avenue, behind Woodland Avenue there is a drive through alleyway. It's common in the suburbs of Philadelphia.

[53] I was on the top end of that drive through alleyway. I noticed the Jeep started to move, so at that point I directed Investigator Turner and Detective Evers. Investigator Turner is with the court warrant unit, Detective Evers is with the Philadelphia Police Department. They're both assigned to the violent crimes task force.

I directed them to go ahead and execute what we call a felony car stop. Investigator Turner took his vehicle, drove down the alleyway and pulled up behind the Jeep Cherokee effectively blocking his escape to the rear.

I placed my vehicle in front to the left front fender of the vehicle to effectively remove his escape to his left.

Q When you say "his escape," who are you talking about?

A Mr. Corley.

Q Okay.

A At that point, Detective Evers took his vehicle and placed it on the driver's side, T-bone the vehicle effectively blocking the passenger side door.

Q I exited my vehicle, came up to the front windshield, left windshield, driver side windshield. Mr. Corley had put his vehicle in reverse or had his vehicle in reverse, slammed into Mr. Turner's vehicle that was behind him.

Mr. Turner – I believe, if I'm not mistaken, was [54] hit towards the left rear, a wheel well. Mr. Turner was still able to get out of his vehicle and approach the passenger side.

I identified myself loudly as did Mr. Turner who had his badge out at the time. I had my weapon drawn for my safety. This is a common practice when apprehending an individual on a warrant.

We made commands to Mr. Corley to show his hands. I repeated these commands numerous times. The entire time he's inside the Cherokee, he did not comply with those commands.

When I came up to the windshield I noticed a young girl, later find out a nine-year-old daughter of Mr. Corley, in the passenger side of the vehicle, so there was obviously concern for the little girl.

Again Mr. Corley would not comply. At one point he reached behind the seat of the jeep. I did not fire into the jeep for the safety of the child. The passenger side door then opened, buy I didn't see who opened it.

Mr. Corley started sliding behind his daughter outside the passenger side of the vehicle. I did not know at that time whether Mr. Corley was finally deciding to surrender or not.

When the passenger door opened almost instantaneously Investigator Turner, who again was on the [55] other side of the vehicle, shouted for my help. I ran around the front end of the vehicle and came around where I saw Investigator Turner was partially knocked to the ground.

His nine-year-old daughter was screaming and crying right there at that scene and Mr. Corley was just disengaging himself from Investigator Turner and he ran around the side of 1318 Woodland Avenue.

He ran through the front yard –

Q Let me stop you before you go on.

When you and Investigator Turner were around this vehicle and you said you were commanding him to stop, were you doing it in a low voice or were – what was your tone when you were speaking?

A No, because at this – at this point I didn't know what his intentions were, so obviously adrenaline is high. We were – I was using a command voice where there is no question that he heard me or

understood what I was saying, or who I was. Investigator Turner was doing the same from the other side.

Q Now, when you say "disengaged himself" – where was the little girl? How did she get out of the vehicle and how did Mr. Corley at some point get out of the vehicle?

A If I remember, the little girl was on the one side of Investigator Turner and Mr. Corley was Turner's left side and he escaped Mr. Turner.

[56] Q Did the little girl walk out of the van herself?

A Absolutely not.

Q What happened? Tell us what happened? How did she get out of the van?

A Well, Mr. Corley effectively pushed his daughter outside of the van – outside of the truck, blocking Investigator Turner. It was, he later told me, because he wanted his freedom and he ran around the side of the house.

Q Now, did he –

MR. COOPER: Your Honor, I'm going to object if the officer didn't personally witness that.

THE COURT: (Inaudible).

MR. COOPER: Okay.

BY MS. MANN:

Q Now, you said that – did Investigator Turner have his weapon out also?

A He did.

Q Okay. And what was the little girl doing?

A Screaming and crying.

Q Okay. So Investigator Turner takes her or she is put to the side, correct?

A Correct.

Q What happens after Mr. Corley takes off?

A Mr. Corley takes off. Again, Investigator Turner is partially knocked to the ground. I'm not sure at this point [57] where the little girl is as I run by Investigator Turner. I pursue Mr. Corley.

We go across 1318 Woodland Avenue, the yard, we cross the street, we go across the property across the street. Behind the back yards of those properties there is a section of woods with a ravine and about a ten-foot wide creek.

Mr. Corley runs up the hill on the other side, okay, and there is a section of woods. It was slippery and I couldn't get up that side of the hill. I kept slipping, so I went back down to the stream.

Mr. Corley then could not continue into the back yards of the street which is, later I learned, Sharon

Park Drive on the other side of those houses because they were all lined with fences.

He turned right and I then paralleled him down the stream as he is turning, running at the top of this – the top of this hill. There comes a point where there is a break in the fences. Mr. Corley then approaches that break.

At that point I attempt to make it back up the hill. I get about halfway up the hill and I stop. I had my weapon drawn, and I did not know whether Mr. Corley was going to turn, fire a weapon at me or not, so I was ready for that situation.

Mr. Corley then turned the corner of the – of the [58] fences and disappeared from sight. At that point I continued on up the hill, I slipped, I fired a round in the grounds, I don't know where it went, in the hill somewhere in front of me.

I finished – I finally got to the top of the hill, I went around that sense fence line, I did not see Mr. Corley. To my left, the backyard, the fence, there was – the gate was open. I didn't know whether Mr. Corley had run into there, or whether he continued across.

I didn't know where Mr. Turner, whether he wasa [sic] following me or not. I just yelled hoping that he was behind me to check out that back yard while I continued through this – this yard to the street, which is Sharon Park Drive.

At that point across the street out of the corner of my eye I see Mr. Corley running on the other side of the house around the house. I came around – I'm facing the house, he went around the right side of the house, my right. I went around my left side of that house across the street again, and I caught up to Mr. Corley in the back yard.

I either had my weapon drawn, or when I took my weapon out. I ordered Mr. Corley to the ground. He did finally comply, he went to the ground on his stomach. I was by myself, and I again did not know where Mr. Turner was.

So I approached Mr. Corley, I attempted to put [59] handcuffs on him. At that point he continued to struggle. Eventually – probably several seconds, no more than several seconds, Investigator Turner then caught and between the two of us, we were able to turn Mr. Corley back around, get his hands behind his back and handcuff him.

Q Now, you sat [sic] that at some point when you were trying to make it up the slippery leaves, your weapon discharged?

A Yes.

Q Was that accidental?

A That was accidental.

Q Okay. And is there – what is the procedure when there is an accidental discharge with respect to the FBI?

A It's routine procedure where they have to investigate circumstances surrounding the incident.

Q Is that matter pending with the FBI at this point?

A That's still pending.

Q Okay. Now, you said that you were shouting. Was Corporal D'Angelo there during this incident?

A I'm not – he was in the vicinity. I'm not sure where he was during all this. I did not see him until Mr. Corley was already in cuffs and the situation had calmed down.

Q And the little girl was fine?

A The little girl was fine.

Q Okay. Now, after Mr. Corley was arrested what did you do? Did he receive any scraps [sic] or injuries as a result of [60] his arrest?

A He had cut his hand. He later told me that he cut it on a rock while he was trying either to climb up or in the stream. I had two agents or three agents take Mr. Corley to the hospital to get his hand looked at while I stayed there at the scene.

Q Okay. Now, at some point later that day which is September 17th, you then had an opportunity to speak with the defendant, is that correct?

A I did.

Q Okay. And when you spoke with him – I'll show you what yesterday was marked as Government Exhibit 10.

When you're attempting to interview someone through FBI procedures, do you normally advise them of your rights?

A I do.

Q All right. Okay. And is that standard procedure with the FBI?

A It's standard amongst any law enforcement.

Q Okay. And did you have an opportunity to do that in this case?

A I did.

Q Okay. Government Exhibit 10, do you recognize this document?

A I do.

Q Okay. And tell us what it is?

[61] A This is what we refer as to a 395. As you can see in the upper left-hand corner it's federal document 395. It's an advice of rights forms – it's an advice of rights form.

Up on the top right-hand side it's the location that you read him his rights, the date and the time. You then read him his rights. You have him confirm that he understood his rights. I always get the individual to read them as I'm reading them, or at least

read them back to me. Then I ask him if he's willing to make a statement.

Q Did you do that in this case?

A I did that in this case.

Q And what happened when you asked him to read the advice of rights form?

A He read the advice of rights. He acknowledged that he understood his rights and he signed the waiver form.

Q And who was present during that interview?

A That was myself and Trooper D'Angelo.

Q Okay. is that correct?

A Now, yesterday Mr. Cooper asked Corporal D'Angelo about it doesn't say what you're questioning him about. Is that your standard advice of rights form with the FBI?

A Yes, it is.

Q Are there any forms that ever indicate what the questioning will be about?

[62] A No.

Q Okay. So after he signs it?

A After he signs it the witnesses that are there then also sign to witness the fact that he signed that knowingly and voluntarily which was myself and Trooper D'Angelo. I'm on top and Trooper D'Angelo is

on the bottom. We then write the time that we witness the form.

Q And after you have him sign that form, after he signed it what, if anything, happened next?

A At that point he had agreed to provide a statement regarding the bank robbery. He then proceeded to tell us how this bank robbery went down from the inception to the end.

Q Now, before you actually interviewed Mr. Corley and before he signed that form, did you give him anything to eat?

A Yes.

Q Okay. And –

A I'm sorry.

Q Go ahead, tell us about that.

A We had Mr. Corley in our interview room. He was uncuffed, we provided him chips, soda and doughnuts, I believe he accepted.

We allowed him to go to the bathroom when he needed. It was I would say a cordial meeting. He was [63] respectful, we were respectful.

Q Okay. And what happened – let's go to the interview. What happened after he signed the form and you said he told you about what happened in the robbery.

A He started relaying the facts of the case. He identified his co-conspirators or his accomplices as Eugene Butler and Gregory Wilson.

He said that Eugene Butler introduced the idea about a month earlier and that Eugene Butler was familiar with the inside of the bank because he had been inside of there. His father – his father was a member at the credit union.

Mr. Corley told us that – certain items about the inside that Butler had told him, that there is usually three tellers in there, two working at any one time. That the little white guy is the manager. That the surveillance cameras are pointed down at the teller drawers.

He said it was a short distance from the door to the teller counters. He then said that on the morning of the robbery, June 16th, Mr. Butler called him to come get him, that they decided to do the robbery.

They also decided to steal a car. Mr. Butler recommended they do it from a train station so it wouldn't be reported stolen for quite a while. Mr. Butler called him, he went to pick up Mr. Wilson. Mr. Wilson came out [64] with a black 40 caliber pistol.

Q Let me stop you right there, Agent Roselli. You said he – the defendant went to pick up one of his accomplices, correct?

A Yes.

Q Did he – did Mr. Corley tell you what car or vehicle he drove to go pick up that individual?

A I'm sorry. He left from his residence, where he was – at 1318 Woodland where he was living with the mother of his children and he took the white 2002 Caravan you saw before. He drove to pick up Gregory Wilson.

He then drove to pick up Mr. Butler in the Germantown section in Philadelphia and then continued on to the train station, which he said was in the East Falls section of Philadelphia.

They stole a maroon van. He said that Mr. Wilson actually stole the van because he had experience in such things, and then they continued on to Norristown in the white Caravan and in the maroon van, the stolen maroon van. They arrived in Norristown, they staged [sic] the maroon van, the stolen maroon van in a drive through alleyway near the bank.

They said that they then went to a store to purchase – and Wilson and Butler went into the store. The store is located on West Marshall he said, between George [65] and Chain Street. That Wilson and Butler went in. Butler came out with glue and fake hair, a fake beard.

They then went back to the, what I will refer to as a switch site, they went back to the stolen maroon van that was in – in that drive through alleyway behind the row of homes.

Q Would you explain for the members of the jury what a switch site is?

A A switch site is where they switch from one car to the other. It's a – so they go back to that switch site and they switch from the white van – they leave the white van there and they get into the maroon van. They are going to use this maroon van in the bank robbery as, what I will refer to as the getaway vehicle, that's what they get away from the bank in.

He recalled that there were two guns. One thing I also forgot to mention is that when they picked up Mr. Butler, he had a silver revolver on him. They then drove to the bank in the stolen maroon van.

The three of them went in together. Before they went in they all had concerns about the door locking on them, so Mr. Corley stated that he grabbed an umbrella that was in the van, and when they went in they used the umbrella to prop the door open.

They had agreed that Corley would go to the little [66] white guy, to the manager, which was in the office to the right. He learned that from Mr. Butler, and that Mr. Butler and Mr. Wilson would go to the teller counter.

When they went in, Mr. Corley says he saw Butler vault the counter. He did not know for sure, but he believes that Wilson made his way around the counter also, and that he with his gun drawn went into the manager's office.

He said he grabbed the video security surveillance tape from – which is on top of the monitor he said, sitting in open view. And then as he – in the room, he hears Butler or he sees Butler running out of the bank saying we're leaving. At that point Mr. Corley left the bank.

Another thing I forgot to mention what that he said he was wearing a bandanna and that all three were wearing gloves going into the bank, and that they all had their faces covered, and that it was Mr. Butler who was wearing the fake beard.

He followed those two out of the bank, entered the van. They fled back to the switch site, which is in that drive through alleyway and switched back to his white van. They left the alleyway and then – excuse me – and then went back to Mr. Butler's house to split the proceeds, which he said were about $45,000.

Q What, if anything, did the defendant tell you about what [67] the money was put in? Did he tell you anything about that?

A He said that they had brought – either Butler or Wilson had brought in a pillowcase with him.

Q All right. You said that he said he went into the small or the little white guy. Did he tell you during your interview with him what he did with the small white guy or the little white guy?

A That he ordered him – he had his gun. I believe he said he ordered him to the ground. I'm not sure whether that was initially or after a while.

Q Now, did he tell you whether he went into the bank or the credit union initially with the gun, or whether it was passed off later? How did –

A What he said was that once they were inside the bank that Wilson handed him the black handgun, the 40 – what he described as a black 40 caliber pistol.

Q According to the defendant's statement, there were only two guns used in this robbery?

A According to him, he had a gun and Mr. Butler had that silver revolver.

Q Okay. And did he, in fact, tell you how much money of the proceeds – how much he received and how much was shared among them?

A He said it was approximately $45,000. I believe he said they split it evenly.

[68] Q And where did they split the money and what happened?

A Well, they after they went to the switch site, they abandoned the maroon van. They entered the Dodge Caravan, drove back to Mr. Butler's residence in Philadelphia, the Germantown section of Philadelphia.

Q Did he tell you where they abandoned the van?

A At that switch site, in that drive through alleyway.

Q Okay.

A A few blocks from the bank.

Q Now, after Mr. Corley tells us this what, if anything, did you do or ask him to do after he tells you what happened in the bank robbery.

A This was later in the afternoon. By the time he had finished at the hospital getting attended to, and – that we met up again – this is later in the afternoon.

Q He then said, "Hey, I'm tired." The normal procedure is after an individual is cooperative and volunteers a statement, you then have him write a statement out. He said he was tired, he'll do it – we could do it tomorrow. So we agreed, we'll do it tomorrow. At that point The interview terminated.

We then met with him early the next morning and, again, interviewed him in the same interview room.

Q Let me just stop you for one minute. I am going to show you what is marked as Government Exhibit 16.

[69] (Pause in proceedings.)

Q You said you met with him the next morning, correct?

A Yes.

Q And when you met with him –

(Pause in proceedings.)

Q I show you Government Exhibit 16. Do you recognize this document?

A Yes.

Q Tell the members of the jury what it is.

A Again, this is another FD-395 advice of rights form.

Q You gave him another form?

A Yes.

Q Okay. Could you read that form for us (inaudible).

A Again, I read him the rights just to make sure he didn't have a change of heart.

"Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before you are asked any questions. You have the right to have a lawyer with you during questioning.

"If you cannot afford a lawyer one will be appointed for you before any questioning, if you wish. I have read the statement of my rights, and I understand what my rights are. At his [sic] time I am willing to answer questions [70] without a lawyer present."

I forgot the one line. "If you decide to answer questions now without a lawyer present, you have the right to stop answering at any time."

At that point we provide him the advice of rights form. Again, he acknowledges that he understands his rights, that he's willing to continue the interview. He then waives his rights by signing the form.

Q And you saw him sign that form?

A We both did, yes.

Q When you say "We both did," who was present for that?

A I grabbed another agent from my squad, Special Agent Stephen Heaney.

Q Now –

A It's H-E-A-N-E-Y.

Q Did you at any point during this second interview give Mr. Corley anything to drink?

A Again, same procedure. Asked him if he needed to use the bathroom, I forget if he did or not. He was uncuffed. We did not have – I don't believe I had my weapon on me, or if it was, it was concealed as was Mr. Heaney's. We offered him food and drink and, again, he accepted and I got it for him. We then proceeded with the interview.

Q Okay. Now, there is something else at the bottom of this form that's not on Exhibit 16. Could you read that for [71] the jury.

A Underneath my signature and Agent Heaney's signature, you have the time, 10:45, and then there's the initial paragraph.

"I, Johnnie Corley, provide the following statement voluntarily. It is being written for me by S.A. Roselli. It is in my own words. I have not been threatened or coerced to provide this statement."

Q Okay. Where did you get that from? Did he tell you that?

A Yes. What happens is, when you're interviewing a subject of a crime and the individual is cooperative, I ask that individual, do you want to give a statement now. He agrees with providing a statement.

I then ask him do you want me to write it for you, or do you want to write it. Usually – actually, I could only remember maybe one or two exceptions, if that. The subject tells me no, you go ahead and write it, so I take my pen out and I write down his words.

Q Okay. So after you take that down what if, anything, happened after you write that paragraph? Do you talk to him again?

A We're talking the whole time.

Q Okay.

A Okay. Again, it's not an adversarial conversation. He [72] was quite cordial as well myself and Agent Heaney. That's the first paragraph, and then we continue the statement on the back of the 395 where he talks about specifically the bank robbery.

Q Okay. Now, I'm going to show you what's going to be marked as Government Exhibit 17, and tell me if you recognize that item?

(Pause in proceedings.)

A This is just a continuation of that same advice form. It's actually written on the back of the form.

Q Could you read the defendant?

A Yes. "I participated in the armed robbery of the Norsco Federal Credit Union on June 16th, 2003. The others involved were Eugene Butler and Gregory Wilson. We drove in my van to a train station that morning. Gregory stole a mini-van for us to use as the getaway vehicle.

"We drove to Norristown and parked my car a short distance from the bank and then drove to the stolen van to the bank. We went in at gunpoint, stole approximately $45,000, then fled in the stolen van. We switched to my car and drove back to Philadelphia.

"Words cannot express my sorrow and remorse for endangering the lives of others. I apologize and take full responsibility for my actions. I hope to

straighten my life from this point forward. The above is true and accurate to [73] the best of my recollection."

At that point we stop and we say this is what you want to say, read it over. What I normally do is I have him read the first few sentences out loud and then we read it along with him.

He reads the statement. If that's fine – if he wanted to make any changes, he could cross out and initial and make whatever changes he wanted to.

Q Did you ask him if he wanted to make any changes?

A I did. He said this was fine, he then signed the document, dated it, September 18th, 2003. Again myself and Agent Heaney as witnessing officers and then he signed the bottom.

Q All right. Okay. Now, prior to your interview on the 17th or even on the 18th, did you tell the defendant any facts you knew about the robbery that occurred on June 16th of 2003?

A Absolutely not, no.

Q Okay. Now, did you learn anything that you did not know about the robbery from the defendant?

A I did. Well, first of all, I had never been inside the bank, I had not seen the bank at that point. I did not know that the little white guy was Mr. Frisea, who you saw yesterday who went back as a little white guy. I did not know how small the bank was.

[74] THE COURT: (Inaudible) really was.

THE WITNESS: You're right, Your Honor, I'm sorry. I also was not certain that Mr. Butler was involved in the robbery, but he confirmed my suspicions.

I did not know that Mr. Butler was – had – was a member or his father was a member of that bank. I later learned that Mr. Butler's father actually from – was a member at that bank.

Also as you heard – also learned from Ms. Newbert that Eugene Butler, date of birth of July 15th, 1981 resides at 1950 Kohn Street, which is just around the corner from where the vehicle was recovered at I think it was the 800 block Haws Avenue.

Also I did not know where the store was.

Q What store?

A The store where he bought the hair and the glue from. We learned that there is, in fact, a store, or I learned there is, in fact, a store on West Marshall between Chain and George Streets in Norristown.

MS. MANN: May I have the Court's indulgence for one second.

(No response heard.)

THE WITNESS: I'm sorry. I also learned that the cameras do, in fact, point down at the teller drawers. Again, that was when I went to the bank to take pictures, I [75] found that out.

And that, in fact, the video security surveillance camera – I had not seen pictures of the bank prior to this point actually was on top of the monitor in the safe room which is adjacent to Mr. Frisea's office.

BY MS. MANN:

Q Now, during the time you're investigating, the state police are conducting their investigation, correct?

A That's correct.

Q Now, were you aware at the time that you interviewed the defendant on the 17th or the 18th, were you aware that a fingerprint of Gregory Wilson had been lifted on the outside of the van?

A I was.

MS. MANN: I have nothing further.

THE COURT: All right. It would be appropriate at this time to take the morning break.

(Recess, 10:56 a.m. to 11:15 a.m.)

THE COURT: Please be seated. Mr. Cooper.

MR. COOPER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. COOPER:

Q Good morning.

A Mr. Cooper.

Q Now, you're assignment in this case in [sic] to investigate [76] the Norsco robbery, is that true?

A That is true.

Q And on June 16th of 2003, you had not received that assignment of that date?

A That's correct.

Q When did you receive the assignment to investigate the robbery?

A Several weeks to a month later.

Q Summer of 2003 is a fair statement?

A That's correct, prior to September 17, yes, sir.

Q Prior to September 17th. All right.

Now, as the assigned person it's your job, if I'm correct, if necessary to interview witnesses, correct?

A Correct.

Q Collect evidence, correct?

A Correct.

Q Turn evidence over for processing?

A Correct.

Q Receive evidence from other investigators to determine what to do about it?

A Correct.

Q Go to the scene?

A Correct.

Q Photograph the scene, if you want?

A Yes.

[77] Q Examine other photographs of the scene if you want?

A Yes.

Q Talk to the people that were present at the bank at the time the robbery happened, correct?

A Not at the time.

Q I mean that were present –

A Yes.

Q – when it happened –

A Yes.

Q – but interviewed them later?

A Yes, sir.

Q Read the reports generated by other investigators?

A That's correct.

Q Solve the crime?

A That's correct.

Q Obtain a confession, if you can?

A If I can, of course.

Q Now, do you agree with me if I say that no one identified Mr. Corley as being one of the robbers? Is that your understanding of the case?

A Nobody at the bank as in the victims at the bank?

Q Yes, sir.

A That's correct.

Q That as far as the collection of evidence is concerned, whether it be fingerprints or photographs or any of the [78] investigative techniques of that nature, there was no evidence that proved that Mr. Corley committed the offense, correct?

A There is no forensic evidence, correct, aside from his statement.

Q Okay. And when we're talking about the statement, the statement – the statement is it, fair, fair to say?

A As far as forensic evidence and people at the bank identifying Mr. Corley as the doer?

Q Yes, sir.

A As I said, no.

Q Okay. Well, let's talk about September 17th in the morning. You talked about this chase that took place, the chase of Mr. Corley.

A That's correct.

Q Now, you testified earlier that there was a warrant for Mr. Corley, correct?

A Yes.

Q A City warrant, correct?

A I didn't say City warrant, but it was a Philadelphia failure to appear warrant, yes, sir.

Q Not a federal warrant?

A Not a federal warrant, no, sir.

Q And you are a federal officer, correct?

A I am a federal officer.

[79] Q Now, during this leaving the area, this foot chase, you mentioned that there was an Officer Turner that was with you.

A Correct.

Q Officer Turner, at the time that you were chasing Mr. Corley was behind you?

A As I said, I did not know where Mr. Turner was.

Q Okay.

A Investigator Turner, the last I saw him, was knocked partially to the ground being 1318 Woodland Avenue with his nine-year-old daughter.

Q All right. So when you were chasing Mr. Corley –

A That's correct.

Q – the testimony is you don't see Officer Turner?

A Alls (sic) I see is Mr. Corley in front of me.

Q Now, did you see Mr. Corley with a gun in his hand?

A I never saw a gun, no, sir.

Q Now –

A Now again, I only saw his back and I only saw him scurrying out of the car.

Q Would it be fair to say though when he's running, I mean his hands are moving, is that a fair description of while he is running?

A It's a fair description.

Q Okay. And would it be fair to say you were able to [80] observe his hands while you were chasing him? You could see the direction of his hands?

A I remember because I am concerned that he has a gun –

Q Okay.

A – trying to see if he has a gun, and I never could get close enough to see whether he had one in his hands or not, or whether he had tucked one inside his pants in his front, so at any point I did not know if he had a gun.

Q All right. Let me ask you this.

Is it permissible under FBI policy to fire a warning shot? Is that a permissible thing?

A Not at all.

Q Not at all.

A Not at all.

Q Never?

A Never.

Q You said that the incident with regards to the discharge of your weapon –

A Right.

Q – was, I believe you said, still pending, is that what you said?

A It is still being reviewed. Normal procedure is, as I said earlier, at any time there is a weapon fired, where there is an accidental discharge – you have to remember, in my line of work you deal with guns every day –

[81] Q Right.

A – so there are accidental discharges, or if there is a justified shooting or unjustified shooting, it's always a standard review board that looks at the evidence. I am hoping that they come back with no disciplinary action, but I don't know the results.

Q We're talking about a shot or the gun going off, your gun going off, we're talking – that happened?

A As I said, it did.

Q And this is – we're talking about the date of September 17th, 2003 that this occurred, is that correct?

A While I'm chasing Mr. Corley, yes, sir.

Q And now we're talking about today being September of 2004, a little over a year later, is that true?

A That's true.

Q All right. And the incident is still pending for review?

A The Government moves slow.

Q Late in the afternoon you talked to Mr. Corley, that's your testimony, is that correct?

A Yes.

THE COURT: Late in the afternoon of?

MR. COOPER: September 17th.

THE WITNESS: Yes, sir.

BY MR. COOPER:

[82] Q About say 3:00 in the afternoon, is that a fair –

A I believe that's about the time.

Q Okay. Now, you said you started the day at about 6:00 in the morning, is that correct?

A That's correct.

Q And so now we're at 3:00 in the afternoon, you've had a chase, you've had a weapon go off, correct?

A There's a lot of adrenaline and everybody is tired, sure.

Q Okay. I'm sorry, I didn't hear what you just said. Everybody is uptight or everybody is tired? What did you just tell me?

A I'm tired.

Q You're tired?

A Yes.

Q All right. But we still want to solve this crime, still – that's why you're there, is that fair to say?

A Obviously, yes, sir.

Q All right. Now, you have Mr. Corley transported from the hospital to see you with regards to an interrogation, correct?

A Into an interview, yes, sir.

Q And the purpose of that meeting and the purpose of your order to transport Mr. Corley is to

question him about this robbery and to obtain a confession, is that true?

[83] A That is one of the purposes, yes, sir.

Q And you talked about this warning form, the FD-395. You said that this form was signed by Mr. Corley and signed by you and signed by Trooper D'Angelo at about 5:00 p.m. that day, is that correct?

A I believe the time was 5:07, but yes.

Q 5:07.

A Yes, right, around 5:00.

Q You first begin to see Mr. Corley at about 3:00, is that correct?

A Later on in the day, yes, that's about the first time. Whether it's three or 3:50, around there, yes, sir.

Q Okay. Talking about September 17th?

A September 17.

Q And this at the FBI building, is that correct?

A Correct.

Q Now, on the form –

MR. COOPER: If I could move to the podium and go to that.

(Pause in proceedings.)

BY MR. COOPER:

Q Okay. What we're looking at there on the podium is the September 17th advice of rights form, correct?

A Correct.

Q Now, it says at the top the place is Philadelphia.

[84] A Correct.

Q Okay. It does not say FBI building, it does not say location, it says Philadelphia, yes?

A That's what I said, Philadelphia.

Q All right. Now, in these advice of rights and where it says your rights in the body of that where – the space where it says your rights and down to the bottom where the signature appears, is there any handwriting on there or any initials present?

A Above Mr. Corley's signature?

Q Correct.

A No.

Q No initials?

A No.

Q By you, by him, by anybody?

A No.

Q Isn't that what's supposed to be done?

A No, sir.

Q No initialing to say I've read this, or I've seen this, or I know what it is?

A Alls that has to be done is that we make sure that he understands his rights, that he acknowledges his rights, and that he decides whether to volunteer a statement or not.

In this case all that happened, that he acknowledged his rights, he understood his rights, and that [85] he wished to volunteer a statement. He then signed the statement, that is normal procedure.

Q Okay. So before 5:00 and after 3:00, there's no statement by Mr. Corley, correct?

A None whatsoever.

Q Now, this is Mr. Corley, the man that fled from this car, struggled with Officer Turner, ran off and you chased and finally captured him? That's the same guy, right?

A And also used his daughter as a shield, yes, sir.

Q So that's a totally uncooperative person, would that he [sic] a fair assessment of the situation?

A He stated, "I wanted my freedom," and that's why he ran.

Q Okay.

A At the point that we caught up to him, obviously he didn't have his freedom anymore, so the set of circumstances changed and he decided that he would cooperate with law enforcement, with myself.

Q All right. So if I understand your testimony, you would agree with me that someone who tries to escape from an arrest –

A Right.

Q – by officers who identify themselves –

A Right.

Q – uses their daughter, as you say, knocks down an officer, runs off, has to have a struggle with you to be [86] subdued in handcuffs –

A Right.

Q – and taken in –

A Right.

Q – okay, that's not a person who is cooperating –

A At that point, no, sir.

Q All right. And as you said later, you said he wanted his freedom, correct?

A That's what I said, yes, sir.

Q Now, you're saying that he's cooperating with you about an investigation of a bank robbery, that's your testimony, right?

A That's my testimony.

Q Now, the interview – the form of the interview that can take place here in terms of what the interview looks like, the form can be a writing by any party, by you, by Mr. Corley, by Trooper D'Angelo, people could write down what is being said.

That would be one form of the interview, is that fair to say?

A Are you driving at notes?

Q I'm just asking –

A Yes.

Q I'm asking you can a writing be done, a writing, a written –

[87] A A writing. I use notes to assist my memory.

Q All right. Well, it's a fair statement to say that you did not dictate the results of this particular interview until five days after it was supposed to have taken place, is that correct?

A I think the transcription date – the date I typed up what we call a 302 –

Q Right.

A – was September 23rd, so that's six days.

Q Six says. There can also be another form of the interview which is typed questions and answers,

like you type out the question and or write out the question and then an answer given. That can be done also, correct?

A You're talking to a FBI agent –

Q In an interview.

A – FBI agents don't do that, so there is not a form that exists in my interview procedures.

Q Well, you could take a sheet of paper, you could write down the question, and ask the person that you're asking to answer that question and either you write the answer or they write the answer, that could be a way it takes place, correct?

A I know Phillie PD does that. Sure, that's an interview technique.

Q All right. You can also tape record the inter [88] video or audio, is that correct?

A No, sir. I am not allowed to tape record an interview unless I have proper authority up the chain, and that was not nccessary at this point.

Q Well, when you say it was not necessary at this point – let me ask you about this.

You could obtain permission to record the interview if you wanted that to happen, is that correct?

A It would be – I believe it would be a lengthy process. I don't know if I could have had the appropriate approval that day, September 17, to record his statement, so I don't know the answer to that.

Q All right. Let me ask you this question. Did you ask for approval to record the interview?

A Absolutely not.

Q Now, there is summary of this interview typewritten that was dictated by you six days after September 17th, true?

A I actually typed it out myself.

Q Typed it yourself.

A Yes, sir.

Q Okay. Now, would it be fair to say that if you are using a 302 form to record the interview that took place, that the opening paragraph of that 302 should be advising subject of the identity of the interviewing agents and the nature of the inquiry? Isn't that what FBI policy is?

[89] A The FBI policy is to advise him of the nature of the interview. Whether I put that in my 302 there, I don't recall. I normally do.

Q All right. If I showed you a document, would that help you refresh your recollection as to whether you put that information on the 302?

A Correct.

Q Let me show you –

MR. COOPER: This would be D-4.

(Pause in proceedings.)

BY MR. COOPER:

Q I'm showing you what has been marked previously as D-4. Take a look at that.

(Pause in proceedings.)

A Okay.

Q Do you recognize it?

A I do, it's my 302.

Q Okay. The opening paragraph is here at the top, correct?

A That's correct.

Q Okay. Does that opening paragraph refer to the nature of the inquiry?

A It is my summary that (indiscernible) the advice of rights which he waived. Now, during the advice of rights and prior to the advice of rights I advised him of the [90] nature of the interview and then I put that he, Mr. Corley, volunteered the following.

Q Okay.

A So it is redundant and unnecessary to put in the fact that I advised him of the nature of the

interview because it is obviously apparent that he had been advised of the nature of the interview.

Q Okay. Didn't you just say –

A That is my standard 302 on every subject that I get a statement from.

Q Didn't you just testify that that's what you normally do?

A I interview hundreds of people, whether they're victims, whether they're witnesses, whether they're uncooperative witnesses, and whether they're subjects.

In the majority of my interviews when it's not obvious about what the topic of conversation is going to be, I write that I advised the person of the identify of the interviewing agents and the nature of the interview, which are not shown here, but is in another 302 of the same day, I do say that he was arrested – excuse me – he was advised of the nature of the interview and its obvious what we are talking about.

Q Okay. This particular 302 does not reflect that you agree?

[91] A I do not have –

Q Is that a fair –

A – words that I advise him of the nature of the interview, however it is inherently obvious in that 302, and in the other 302.

Q All right. Now, before this interview took place on September 17th, do you agree with me that you had the reports of the incident from the Pennsylvania State Police concerning the robbery, you had them in your file?

A I either had them with me. I might not have had all of them.

Q Right.

A Again, I had basically just gotten involved in the investigation.

Q All right. But these reports contained witness accounts, correct, eyewitness –

A Again, I don't know if I had all of the eyewitness accounts. I had several summary reports of different information that assisted me in identifying who is responsible for this bank robbery.

Q Okay.

A I do not know or recall when I got or when I read the specific witness – excuse me – accounts of how the robbery went down. As a matter of fact, I'm pretty sure it happened well afterwards.

[92] Q The purpose of the interview, if I understand it, is to get as many details as possible, true?

A Of course.

Q All right. And the purpose of getting the details is to see what can be corroborated, correct?

A The purpose of the initial interview is that I want to see who was involved in the robbery. The purpose is to hopefully get him to admit his involvement, if there was involvement which, in this case, he did.

When somebody is cooperative, you don't always – or, in fact, there will be future times that I would assume that you would be able to get more specific details that you can corroborate because at this time this individual is cooperative, and I'm going – and I am going to in my mind believe that he will continue his cooperation.

So there should be ample opportunity to get all the specific details to corroborate it. The most important thing on that day was to get Mr. Corley's side of the story and he volunteered – voluntarily and freely admitted his involvement in the robbery.

Q Okay. Would it also be fair to say – and as far as the date of September 17th, 2003, you don't know at that point in time if you're ever going to talk to Mr. Corley again in the same situation, is that fair to say?

A It's not fair to say, no, sir, not fair at all.

[93] Q It's not fair to say that?

A No.

Q So you're absolutely positively sure that he's going to talk to you again and therefore I don't need to get all the details now? That's what you're saying?

A That's what I'm saying and that's what he said. The whole premise of his cooperation and statements from him was that he wanted to help himself out and would continue cooperation. To me it's obvious that we're going to be talking again.

Q At the end of this particular session that took place, you said that you wanted to have a written statement on that day, is that fair to say? You wanted to say let's right [sic] it down. What we've talked about, let's write it down, that's your testimony?

A It's fair to say, yes, sir.

Q All right. And that you're saying that Mr. Corley said "not now"?

A That's what I'm saying. He said he was tired, we understood, it was a long day, there was a lot of adrenaline, like I said earlier, that I'm sure he was probably ready to call it a day.

So we agreed because, again, it was a cordial interview. He was not being disrespectful, he was being quite cordial and polite. As a matter of fact, even joking [94] around a bit as we were, and then we agreed to do it the following morning.

Q Let me direct your attention to what happened the following morning.

(Pause in proceedings.)

Q This begins with this advice of rights form again, and we know the time up here that says 10:44. Is that a.m., by the way?

A That's a.m.

Q And then we have a 10:45 down here, is that right?

A That's correct.

Q Okay. And then we have this written here, is that correct?

A That's correct.

Q And this is not signed down here, is it?

A It is not.

Q All right. And this exhibit is the next – or the back of this form –

A Right.

Q – which has your handwriting, is that correct?

A That's correct.

Q Okay. And this is a handwriting that you made on that day, is that correct?

A That's correct, and that's on the back of that form which his signature and my signature and Agent Heaney's [95] signature on the front, and on the back the same three signatures.

Q Is there a time written down here, by the way?

A No, there isn't.

Q Okay. Now, this particular writing that you did, okay, this took between the front and the back, this took what, about 15 or 20 minutes?

A I believe I have that documented in my other 302. I don't recall how long it took –

Q All right.

A – but you're probably about right.

Q Okay.

MR. COOPER: May I have a moment, Your Honor?

(No response heard.)

(Pause in proceedings.)

BY MR. COOPER:

Q If I said (inaudible) 10:45 and 10:44 provided written statement until 10:52 a.m.

A If that's what I have there, that's how long it took.

Q That's about eight minutes?

A Okay.

Q Okay. So you said that we stopped it that night because it's been a long day and there's a lot of adrenaline, et cetera, but there's not going to be an extra minutes devoted to anything written down, is that your testimony?

[96] A It's my testimony, yes, sir.

Q Now, this white van that you talked about –

A Right.

Q – you had seen the van before September 17th, correct?

A I did, yes.

Q And you also were aware of how many tellers worked at the bank, correct?

A Like I said before, I don't believe I read all the witness statements until after September 17th, probably well after September 17th. I don't recall how many tellers were at the bank on the date that Mr. Corley admitted to his involvement.

Q All right. We can agree though, can't we, Agent Roselli, that your testimony is that the conversation between you and Mr. Corley took place late in the afternoon on September 17th? There was a conversation between you and him?

A That's right.

Q And the summary of the results of that particular interview, do not appear in typewritten form on paper until the date of September 23rd, 2003, is that fair to say?

A No, it's not fair to say. He writes it on September 18th, so there is a record of his admission about his participation in the robbery.

I on September 23rd then summarized the interview, [97] going off of my notes, summarized the interview and put it an FD-302 on September 23rd. That's normal procedure.

Q You said he writes on September 18th.

A Excuse me. I wrote it –

Q Right, on September 18th.

A I wrote it, he spoke.

(Pause in proceedings.)

Q According to your testimony, Mr. Corley said that everybody wore gloves in the bank?

A That's correct.

Q Now, you're aware that Mr. Frisea, Victor Frisea, the manager at the bank?

A That's correct.

Q Do you remember he testified that everybody – not everybody, two of the people that he saw were barehanded?

A Well, he testified that – when you brought up his statement that he gave on the day of the robbery where he said – that you brought up that there was only one individual, he said no, that there were two.

So I don't know whether his memory lapsed between September 16 – or June 16 and over a year

later to this date, but he did say that there were two people in there and they did not have gloves on.

Q Okay. That's what you heard him say. You were here yesterday for that testimony, you heard him –

[98] A Yes.

Q – me questioning him and him answering?

A Yes, sir.

Q How tall are you, sir?

A I'm five-ten.

Q Five-ten?

A Five-ten.

MR. COOPER: Your Honor –

THE WITNESS: And a half.

MR. COOPER: I'm sorry, go ahead.

THE WITNESS: And a half.

MR. COOPER: And a half, okay.

THE COURT: He's a (inaudible).

MR. COOPER: May I see the Court at sidebar, briefly?

(No response heard.)

(The sidebar discussion could not be heard.)

MR. COOPER: That's all I have, Your Honor, thank you.

MS. MANN: I have brief redirect.

REDIRECT EXAMINATION

BY MS. MANN:

Q Agent Roselli, you spoke with some people, some of the victims of the credit union, the employees subsequent to Mr. Corley being charged, cor

[99] A That's correct.

Q Okay. And you were present for Stephanie Newbert's testimony yesterday, the now president of the credit union, is that correct?

A That's right.

Q Did she, in fact, testify that there were gloves used by the man that grabbed her by the back of the neck?

A Yes.

Q Okay. Now, Mr. Cooper asked you about you being there to pick up the defendant on a state (sic) warrant. You were authorized to do that, correct?

A That's correct.

Q And Investigator Turner was deputized in that task force also able to do that, correct?

A That's correct.

Q Okay. You didn't fire any warning shot that day, did you?

A Did not.

Q It was accidental?

A Okay. The procedure on the advice of rights, your testimony is every agency does it different with respect to initialling by each statement?

A That's – every age – not every agency. Some agents do, some don't, and in this particular situation, he was very cooperative, I had no doubt in my mind that he [100] understood every line of the advice of rights both days, September 17 and September 18, and had him sign the statement.

Q Did he ever say stop during the interview?

A He never did.

Q Okay. Now, you were asked about whether – strike that.

Mr. Cooper asked you whether you were concerned about not meeting with Mr. Corley again after September 17th. Did you feel like you had gotten a good bit of details on September 17th?

A Yes.

Q Okay. But you still wanted to interview him again, correct?

A Of course.

Q Okay. All right. And you were fairly competent you would have an opportunity to do that on September 18th, correct?

A We actually had both agreed that after September 18th that we would meet again.

Q Okay. Now, with respect to, I think it was, Defense Exhibit 4 Mr. Cooper showed you, and you said that you had prepared this report on September 23rd a few days after the incident.

A Right.

Q What's the procedure every time you come in contact with [101] someone or some thing when you're working on it, are you required to repair a report – or do you repair – prepare a report?

A Every time there is an investigative procedure made that's relevant to the investigation at hand, you provide a – you prepare a report.

Q Okay. So even though you got a statement from him on the 17th, you still had to prepare a report, correct?

A Correct.

Q And then after – and you comprise that report of what happened on the 17th and the 18th together in the report on September 23rd, correct?

A Yes.

MS. MANN: I have nothing further.

THE COURT: Mr. Cooper?

MR. COOPER: Yes, briefly, Your Honor.

(Pause in proceedings.)

CROSS-EXAMINATION

BY MR. COOPER:

Q Agent Roselli, at the conclusion of the day on September 17th, you're testifying that this gentleman here was cooperative, correct?

A Very much, so, yes, sir.

Q All right. Very much so.

Very much so to the point that you're going to meet [102] the next day and discuss it further, is that correct?

A As we did, yes, sir.

Q All right. And you're going to discuss it further and get additional details that you cover on the 17th, is that correct?

A The goal of the following morning was to provide a written statement. We had to process him, we had a number of things to do before a certain time, so I had somewhat of a time line.

I was convinced after September 17 that Mr. Corley would remain cooperative after that date and that we can get into the nitty-gritty details at a later time.

Q All right. Maybe I misheard you and if I did, I'm sorry.

I thought you said earlier that the following day you were going to get additional details. Did I mishear you when you said that earlier?

A I don't – I'm not sure what I said earlier. Let me clarify what I just said.

Q Okay.

A That the following day additional details – we got the statement and we talked and we – I asked him questions and he answered them, and some of them were unrelated to the bank robbery.

Q I understand that. But the statements about the bank [103] robbery contained nothing new than what was told to you on the 17th that you wrote, isn't that true?

A Again, maybe you misunderstood me before –

Q Okay.

A – and now is that I was under the correct or I was under the impression that we would talk at a later date, and that we would be able to get more details.

I had to continue the investigation and see what details I needed, so I got on that day, September 17, and September 18th, at that point in the investigation I was very much satisfied with where we were at that point, as was relayed to me by Mr. Corley.

Q Okay. Now, when you say the guy is being totally cooperative and you say we're going to meet the next day and we're going to get it down on paper, that's what you're telling me, is that right?

A Words to that effect, yes, sir.

Q So the next day you meet and you got the paper and you're going to get it down on paper, right?

A That's right.

Q All right. And he is going to write the statement, right? He's going to write it in his own words, that's what you wanted, right?

A Either he writes it, or like I said, the majority of times or maybe one or two other times in my seven-year [104] experience, did the subject in an investigation actually write it themselves.

Q Okay.

A They normally just tell me why don't you write it and we agree that it will be based on what he wants me to write.

Q All right. But you testified earlier that this situation it was obvious that he was cooperating, that's the why the 302 that I showed you doesn't reflect the nature of the inquiry.

He was on board according to you and that's what he was going to do, and he was going to be cooperative, isn't that what you said earlier?

A That was kind of a long question. Let me make sure I understand your question.

Q Sure.

A I told you that that 302 was my standard, that top paragraph was a standard paragraph in situations where you have an individual who confessed to a crime, therefore would be charged with the crime, that is my standard paragraph.

What I said was, that is inherent in that 302 in conjunction with the other 302, okay, which you have, that states what the topic of conversation was.

There's absolutely no doubt in his mind – excuse me – there's absolutely no doubt in my mind that he understood the nature of the investigation. I think that [105] answers your question.

Q All right. So he's going to write it down, I mean – but he doesn't write it down?

A As I said before, on September 17th he doesn't write it down, nor on September 18th technically, I write it for him, but we agreed on September 17th that we would write it down the following day. It was very cordial, sir, as I said many times.

Q All right. So cordial that the next day you had to write it?

MS. MANN: Objection, Your Honor. This has been asked and answered.

THE COURT: That's not what he said. He said he (inaudible) client said (inaudible) he'd write it down, that's what he said to me.

BY MR. COOPER:

Q That's how cordial it was that you would write it down and he would talk?

A I don't know how many – yes, sir, yes. We agreed at the end of the September 17th interview, okay, that the following morning because he was tired, and I didn't want to turn it adversarily and start forcing him or asking him or pushing the point that no, you will write it now. Okay.

We agreed at the end of September 17 that we would write it the following day, and there was no reason for us [106] to do it any other way because the term I like to use is "We're on the same page."

MR. COOPER: Fine. Thank you.

MS. MANN: I have nothing further.

THE COURT: Thank you.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

THE COURT: Call your next witness.

MS. MANN: Special Agent Thomas Scanzano. He's right outside.

THE COURT: How long is he going to be?

MS. MANN: He's very short, Your Honor.

THE COURT: He's going to be brief –

MS. MANN: He'll be brief.

THE COURT: – not short. I'm short, he's brief.

MS. MANN: No, he's not. No one is short in here anymore.

THOMAS SCANZANO, Government's Witness, Sworn.

COURTROOM DEPUTY: Please state your name for the record and spell your last name.

THE WITNESS: Thomas Scanzano, S-C-A-N-Z-A-N-O.

COURTROOM DEPUTY: Thank you.

DIRECT EXAMINATION

BY MS. MANN:

Q Where are you currently employed?

[107] A I'm employed with the Federal Bureau of Investigation in Philadelphia.

Q And how long have you been employed with the FBI?

A Three years.

Q Okay. And are you assigned to any special unit at the FBI?

A I am currently assigned to the public corruption squad. I've just been transferred.

Q Okay. And prior to that what squad were you in?

A I was assigned to the violent crime squad investigating bank robberies.

Q Okay. Were you working with Vito Roselli back on June 17th of 2003?

A Yes, I was.

Q Okay, Now, I would like to direct your attention to some time in the afternoon. Were you contacted to escort someone to a hospital?

A Yes, I was.

Q And did you, in fact, do that?

A Yes, I did.

Q Do you see the person that you escorted to the hospital in the room today?

A Yes, I do.

Q Could you identify that person?

A He's sitting at the defense table right there.

[108] Q All right. Could you describe what color the person has on?

A He has on it looks like a brown jacket with a collared shirt.

Q Okay.

MS. MANN: Indicating the defendant for the record.

BY MS. MANN:

Q What hospital did you take the defendant to?

A We took him to Jefferson Hospital.

Q Okay. And you were accompanied by – did you do it alone, or did you do it with someone else?

A I was accompanied by Special Agent Keith Holdsworth and Special Agent James McCaffrey.

Q Okay. And you waiting at the hospital while the defendant received medical treatment, is that correct?

A That's correct.

Q Okay. Now, during the time – do you remember what time you got to the hospital?

A Approximately 12, 12:30, some time in that –

Q Okay. And how long were you there for, an hour, longer, how long?

A It was approximately three hours. It was a long time.

Q Okay. And you had an opportunity during that time to observe the defendant, correct?

A That's correct.

[109] Q Okay. Did he seen [sic] afraid

A He did not.

Q Okay. Did he ever joke around with you while you were at the hospital?

A The three hours that we spent there was very friendly and jovial. We had nice conversation.

Q Did you feed him anything while he was there?

A We offered him food. I don't know if he took it or not. We were there a while, but I know he was offered food.

Q Did he ever tell you he was afraid or anything?

A He did not, no.

MS. MANN: I have nothing further.

CROSS-EXAMINATION

BY MR. COOPER:

Q Good morning.

A Good morning.

Q Where did you transport him from when you took him to the hospital, do you remember?

A Sharon Hill, PD, I believe it was.

Q And then after the hospital treatment was received, you said you stayed there for about three hours and then you transported him somewhere else?

A Yes, sir, that's correct.

Q Where would that be, sir?

A We brought him to the federal building here, the FBI [110] building.

Q Okay. That's the building here at 6th and –

A 600 Arch Street, yes, sir.

Q Okay. Now, when you brought him from the hospital to the FBI building, you had a transportation team with you, two other officers?

A That's correct, two other agents.

Q Okay. You were in a car – a car that belongs to your agency?

A Yes, sir.

Q All right. And Mr. Corley was transported in that car with –

A Yes, sir.

Q – the three of you?

A Yes.

Q All right. And when you brought him to the – to the building, to the FBI building, is it fair to say that he's being brought there as a prisoner?

A He's in handcuffs.

Q Okay. And he's taken – when you bring him to the building, to the FBI building, you're not taking him in the regular way that the public would walk in, there's another way for him to go in being escorted by you?

A We park our vehicles, the FBI vehicles in the basement. We parked down there and took the elevator up to our [111] office.

Q And then when you took him up to the office – this is the office of the FBI?

A That's correct, sir.

Q That's the eighth floor of the building?

A Yes, sir.

Q All right. And when you take him up there – what do you do next, after you take him up there?

A I bring him into the interview room and I let Agent Roselli know that he's there and they take custody of him.

Q Okay. So when you say you bring him to an interview room, wherever that's situated, and then you let – you informed Agent Roselli that Mr. Corley is present in the interview room, is that accurate?

A Yes, sir.

Q Now, when you do that Mr. Corley, is he cuffed to a chair, or a table, something like that?

A At the time it was not, he was in handcuffs so I did not handcuff him to a chair or anything, no.

Q Okay. You went to inform Agent Roselli that Mr. Corley was present and the other officer stayed in the room with Mr. Corley, is that what happened?

A Sir, my recollection could have been that Agent Roselli was in the room. He knew we were coming, we had talked on [112] the telephone –

Q Okay.

A – so he might have met us there, I don't know.

Q Anybody else present with Agent Roselli that you recall?

A No, not that I recall.

MR. COOPER: All right. Thank you.

MS. MANN: Your Honor, just a brief clarification.

REDIRECT EXAMINATION

BY MS. MANN:

Q When I asked you when you escorted the defendant to the hospital, I think I said June 17th. Wasn't it September 17th of 2003?

A That's correct, I'm sorry.

Q You said Sharon Hill PD, what is that, police department?

A Police department.

Q Okay.

A I apologize.

MS. MANN: Okay. I have nothing further.

THE COURT: Mr. Cooper.

MR. COOPER: No, sir.

THE COURT: All right. Thank you. You're excused.

THE WITNESS: Yes, sir.

(Witness excused.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

– – –

UNITED STATES OF AMERICA	: CRIMINAL NUMBER : 03-644
v.	:
JOHNNIE CORLEY,	:
Defendant	:
. . . . .	:

GOVERNMENT EXHIBIT 16
(Trial)

ADVICE OF RIGHTS

FD-395 (Rev. 11-5-02)

Place Philadelphia
Date 09/18/03
Time 10:44

YOUR RIGHTS

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions.

You have the right to have a lawyer with you during the questioning.

If you cannot afford a lawyer, one will be appointed for you before any questions if you wish.

If you decide to answer questions now without a lawyer present, you have the right to stop answering at any time.

I have read this statement of my rights and I understand what my rights are. At this time, I am willing to answer questions without a lawyer present.

Signed /s/ Johnnie Corley

Witness: /s/ Vito D. Roselli

Witness: /s/ Stephen J. Heaney, SA, FBI

Time: 10:45

I, Johnnie Corley, provide the following statement voluntarily. It is being written for me by S.A. Roselli. It is in my own words. I have not been threatened or coerced to provide this statement.

I participated in the armed robbery of the Norsco FCU on June 16, 2003. The others involved were Eugene Butler and Gregory Wilson. We drove in my van to a train station that morning. Gregory stole a minivan for us to use as the get-away vehicle. We drove to Norristown and parked my car a short distance from the bank, and then drove the stolen van to the bank. We went in at gun point, stole approximately $45,000, then fled in the stolen van. We switched to my car and drove back to Philadelphia.

Words can not express my sorrow and remorse for endangering the lives of others. I apologize and

take full responsibility for my actions. I hope to straighten my life from this point forward.

The above is true and accurate to the best of my recollection.

X /s/ Johnnie Corley
Sept. 18, 2003

X /s/ Vito D. Roselli

X /s/ Stephen J. Heaney, SA, FBI 9/18/03

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4716

UNITED STATES OF AMERICA

v.

JOHNNIE CORLEY,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 03-cr-00775)
District Judge: Honorable Berle M. Schiller

Argued March 6, 2007

Before: SLOVITER and AMBRO, *Circuit Judges*, and THOMPSON,* *District Judge*

(Opinion filed August 31, 2007)

Maureen Kearney Rowley
Chief Federal Defender
David L. McColgin
Assistant Federal Defender
Supervising Appellate Attorney

---

* Honorable Anne E. Thompson, Senior United States District Judge for the District of New Jersey, sitting by designation.

Elizabeth T. Hey (Argued)
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Chief of Appeals
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Philadelphia, PA 19106

Counsel for Appellee

OPINION OF THE COURT

AMBRO, *Circuit Judge*

Johnnie Corley appeals his conviction and sentence for armed robbery and conspiracy to commit that crime. He presses three arguments: (1) his conviction must be vacated because his confessions should have been suppressed as evidence because they were made outside the six-hour period in 18 U.S.C. § 3501(c) and after the arresting officials violated Federal Rule of Criminal Procedure 5(a) by

unnecessarily delaying in bringing him before a federal magistrate judge; (2) remand is required because (a) he was sentenced prior to the United States Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005) (making the United States Sentencing Guidelines advisory rather than mandatory), triggering this Court's decision in *United States v. Davis*, 407 F.3d 162 (3d Cir. 2005) (*en banc*), that calls for a remand to resentence in most such cases, and (b) the District Court failed to resolve a disputed Guidelines adjustment; and (3) the District Court unlawfully delegated its statutory obligation under the Mandatory Victims Restitution Act of 1996 (MVRA) to set the schedule of restitution payments.

Because we believe that the first contention is governed by our decision in *Government of the Virgin Islands v. Gereau*, 502 F.2d 914 (3d Cir. 1974), and we discern no error in the District Court's determination that Corley's confessions were voluntary, the delay in presenting him to a federal magistrate judge beyond that provided by 18 U.S.C. § 3501(c) will not result in suppressing his confessions. On the second issue Corley raises, he is not entitled to a remand because the District Court did not treat the Guidelines as mandatory, nor did it fail to resolve the disputed Guidelines adjustment. We hold, however, that the Court delegated, contrary to the MVRA, its duty to set a schedule of restitution payments, and we therefore remand to allow the District Court to set that schedule.

I. Facts

On June 16, 2003, three men robbed the Norsco Federal Credit Union in Norristown, Pennsylvania. Federal officials identified Johnnie Corley as a suspect in the robbery and were later informed of an outstanding bench warrant from a state court for him on a matter unrelated to the robbery. On September 17, 2003, at approximately 8:00 a.m., a joint operation of federal and state law enforcement agents attempted to execute the arrest warrant. Corley resisted arrest and, following a physical altercation with an FBI agent during Corley's attempt to flee, was placed under federal arrest for assault on a law enforcement officer.

At approximately 11:45 a.m., the officers transported Corley to Thomas Jefferson Hospital in Philadelphia to receive medical treatment for injuries sustained during the altercation. By 3:30 p.m., after receiving several stitches, Corley was taken to the FBI office in Philadelphia for interrogation concerning the Norristown credit union robbery. He was informed that he was under arrest for assaulting a federal officer and also was under investigation for a robbery. At 5:07 p.m., Corley signed a waiver of his rights, *inter alia,* to remain silent and to counsel under *Miranda v. Arizona,* 384 U.S. 436 (1966). Shortly thereafter he confessed orally to the robbery. When asked to reduce his confession to writing, Corley stated that he was tired and requested to continue the following day. This was done, and the interrogation resumed at 10:30 a.m. on September 18,

and Corley signed a written confession shortly thereafter. Not until 1:30 p.m. did he appear before a federal magistrate judge to be informed of his rights.

On November 20, 2003, a federal grand jury sitting in the Eastern District of Pennsylvania issued a three-count indictment against Corley, charging conspiracy to commit armed bank robbery in violation of 18 U.S.C. § 371 (Count One), armed bank robbery in violation of 18 U.S.C. § 2113(d) (Count Two), and the use and carrying of a firearm in furtherance of a crime of violence in violation of 18 U.S.C. § 924(c) (Count Three). Corley filed, and the District Court denied, a motion to suppress his oral and written confessions pursuant to Rule 5(a) of the Federal Rules of Criminal Procedure. After a jury trial held on September 27-28, 2004, he was convicted of Counts One and Two and acquitted of Count Three.

On December 21, 2004 – after the Supreme Court decided *Blakely v. Washington*, 542 U.S. 296 (2004), but before it decided *United States v. Booker*, 543 U.S. 220 (2005) – the District Court sentenced Corley. In calculating the sentence, the District Judge explained that he viewed *Blakely* (discussed *infra* § III.A) as rendering the United States Sentencing Guidelines advisory:

> [U]ntil I'm told otherwise by the Third Circuit o[r] the Supreme Court, [I] take the position that the guidelines are merely advisory and that for sentencing purposes I have the upper limit[,] which is the statutory max to zero[,] and that when I have to figure and

> fix a sentence, what's on the table is all the conduct, prior history of this particular defendant, or any defendant that's in front of me, and I take all that into account when I fashion my sentence.

J.A. 462. However, the District Judge rejected Corley's argument that, after *Blakely*, any Guidelines enhancements must be specifically found by a jury beyond a reasonable doubt. After hearing the arguments of both parties, the Judge calculated Corley's advisory Guidelines range to be 140 to 175 months, and sentenced him to 170 months in prison. Regarding restitution, the Judge stated:

> The defendant shall make restitution to [Cumis Insurance, in] the amount of $47,532.36. The defendant shall make restitution and fine payments from any wages he may earn in prison in accordance with the Bureau of Prisons Inmate Financial Responsibility Program. The restitution and fines shall be due immediately. Any balance remaining upon release from custody shall be paid at a rate of no less than $100 per month.

In addition to the imprisonment and restitution, Corley received five years supervised release, a fine of $5,000, and a special assessment of $200. He timely appeals.[1]

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[1] The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

II. The Admissibility of Corley's Confessions

The first issue in Corley's appeal involves the permissible length of post-arrest investigation and delay before arresting officers must present the arrested person to a federal magistrate judge. It requires us to interpret 18 U.S.C. § 3501, which governs the admissibility in federal criminal prosecutions of confessions given by persons arrested and in federal custody. The statute was enacted as part of Title II of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 210-11, and the interaction of that statute with the preexisting law governing such confessions raises difficult legal questions.

A. The Presentment Right and the Exclusionary Remedy

As a general matter, federal officials must take persons they arrest before a magistrate judge or other judicial officer without unnecessary delay. Before 1946, that obligation, known as "presentment," appeared in several statutes. *See McNabb v. United States*, 318 U.S. 332, 342 & n.7 (1943) (citing statutes). The Federal Rules of Criminal Procedure first took effect in 1946, and Rule 5(a) provided in relevant part that

> [a]n officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall

> take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States.

That rule now provides in relevant part that "[a] person making an arrest in the United States must take the defendant without unnecessary delay before a magistrate judge . . . unless a statute provides otherwise." Fed. R. Crim. P. 5(a)(1)(A).[2] The Supreme Court characterized Rule 5(a) as "a compendious restatement, without substantive change, of several prior specific federal statutory provisions," *Mallory v. United States,* 354 U.S. 449, 452 (1957), and explained the policy behind the presentment right as follows:

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[2] The term "magistrate" was substituted for "commissioner" in the 1972 amendments to the Rule to conform to the Federal Magistrates Act. *See* Fed. R. Crim. P. 5, Advisory Cmte Notes. In 2002, Rule 5(a) was amended in several respects, including dividing it into subsections and inserting the phrase "unless a statute provides otherwise." The Advisory Committee Notes indicate that this phrase was added to Rule 5(a)(1)(B) – which deals with arrests made outside the United States – "to reflect recent enactment of the Military Extraterritorial Jurisdiction Act (Pub. L. No. 106-523, 114 Stat. 2488) that permits certain persons overseas to appear before a magistrate judge by telephonic communication." As we will explain in further detail, *infra* § II.C., our Court has interpreted 18 U.S.C. § 3501 "as amending the meaning of 'unnecessary delay' as used in Rule 5(a), rather than leaving that term's meaning unchanged and simply allowing the Rule to be violated without sanction." *Gereau,* 502 F.2d at 923 n.5.

> Legislation such as this . . . constitutes an important safeguard – not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime.

Id. at 452-53 (quoting *McNabb,* 318 U.S. at 343-44).

In *McNabb* and *Mallory,* the Supreme Court held that when federal officers violated an arrested person's presentment right by delaying unnecessarily in taking him before a magistrate, the remedy is that confessions elicited from the arrested person before presentment could not be admitted into evidence at any subsequent criminal trial. *Mallory,* 354 U.S. at 455-56; *McNabb,* 318 U.S. at 345. That exclusionary remedy became known as the *McNabb-Mallory* rule, and to courts applying that rule two propositions were clear: (1) a confession obtained before presentment and after an "unnecessary delay" would be suppressed, and (2) the paradigm of "unnecessary delay" is when it is solely for the purpose of eliciting a confession. *United States v. Alvarez-Sanchez,* 975 F.2d 1396, 1398 (9th Cir. 1992), *rev'd on other grounds,* 511 U.S. 350 (1994); *Walton v. United States,* 334 F.2d 343, 346 (10th Cir. 1964) ("Each case must be determined on its own facts[,] . . . [b]ut if the delay in

taking an arrested person before a committing magistrate is for the purpose of extracting a confession, it is a violation of Rule 5(a)."); *see also Mallory,* 354 U.S. at 454 ("The arrested person may, of course, be 'booked' by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately determine his guilt.").

B. 18 U.S.C. § 3501

Eleven years after the Supreme Court decided *Mallory,* and two years after it decided *Miranda* (requiring, *inter alia,* warnings to persons in custody of their constitutional rights as to statements made to police without counsel present), Congress passed the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, part of which was 18 U.S.C. § 3501. Courts, including ours, recognize that § 3501 was a legislative reaction to *McNabb, Mallory,* and *Miranda. See Dickerson v. United States,* 530 U.S. 428, 436 (2000) ("Congress intended by its enactment to overrule *Miranda.*"); *Gereau,* 502 F.2d at 922 (Section 3501 "was expressly designed to provide a test different from *Mallory*'s for judging the admissibility in federal criminal prosecutions of confessions given during the period between arrest and arraignment before a magistrate."); *United States v. Halbert,* 436 F.2d 1226, 1231 (9th Cir. 1970) ("[I]t is obvious that the prime purpose of Congress in the

enactment of § 3501 was to ameliorate the effect of the decision in [*Mallory*].").

Subsection (a) of the statute provides that, in a federal criminal prosecution, "a confession . . . shall be admissible in evidence if it is voluntarily given," and that if a trial judge determines that a confession was voluntary, the jury must be allowed to hear relevant evidence on the issue of voluntariness and to give the confession such weight as the jury believes it deserves.

Subsection (b) instructs the trial judge to determine the voluntariness of a confession by "tak[ing] into consideration all the circumstances surrounding the giving of [it]." This provision notes a nonexclusive list of the circumstances that a trial judge may consider, including "the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment," and whether the defendant had been advised of his rights before making the confession.[3]

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[3] In *Dickerson v. United States*, the Supreme Court understood subsections (a) and (b) as an effort to overrule *Miranda* by making voluntariness the sole test for admissibility of a confession and by making the presence or absence of *Miranda*-type warnings merely a factor in the voluntariness analysis. 530 U.S. at 436. The Court held that *Miranda* was a constitutional decision, and that § 3501 was without effect to the extent that it could be read as overruling *Miranda*. *Id.* at 444; *see also Missouri v. Seibert*, 542 U.S. 600, 609 (2004) ("*Dickerson* reaffirmed *Miranda* and held that its constitutional character prevailed against the statute.").

Subsection (c) provides:

> In any criminal prosecution by the [federal government], a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, **shall not be inadmissible solely because of delay** in bringing such person before a magistrate judge or other officer . . . if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person **within six hours immediately following his arrest or other detention**: *Provided,* That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable **considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer**.

(bold emphases added). Some courts have read that language as providing a "safe harbor" for confessions within six hours after arrest and before presentment. *See, e.g., United States v. Gamez,* 301 F.3d 1138, 1143 (9th Cir. 2002) ("Section 3501(c) creates a six-hour "safe harbor" during which a confession will not be excluded because of delay."); *United States v. Spruill,*

296 F.3d 580, 590 (7th Cir. 2002) ("Section 3501(c) creates a six-hour 'safe harbor' provision that provides that confessions given within six hours of the commencement of detention on a federal charge and an appearance before a magistrate are presumed to have been taken without unnecessary delay."). Under that reading, confessions made within the "safe harbor" are to be treated differently, for the purpose of determining their admissibility, from confessions made outside it.

C. Our Precedent Interpreting Rule 5(a) and 18 U.S.C. § 3501

The interaction between 18 U.S.C. § 3501 and Rule 5(a) raises several difficult legal questions that have divided Courts of Appeals. To resolve this case, we must determine how to reconcile the "voluntariness" test of § 3501 with the "unnecessary delay" standard of Rule 5(a), and we must interpret the statement in § 3501(c) that certain confessions "shall not be inadmissible solely because of delay."

Our leading case addressing those questions is *Gereau*. Among the issues it addressed was the admissibility of defendant Gereau's confession, which was given more than six hours after his arrest, but which the District Court found to be voluntary. In its exposition of the law, our Court, per Chief Judge Seitz, explained:

> The [Federal] Rules [of Criminal Procedure] explicitly recognize that the admissibility of

> evidence in cases governed by the Rules is subject to determination by acts of Congress. Thus, 18 U.S.C. § 3501 controls the admissibility in prosecutions subject to the Federal Rules, of defendants' statements made after arrest and before presentment to a magistrate, and must be viewed as altering [the] interpretation of Rule 5(a)'s direction that an arrested person be taken before a magistrate 'without unnecessary delay.'
>
> . . . .
>
> While the Federal Rules' provision regarding presentation before a magistrate is 'procedural,' unlike the 'substantive' rule of § 3501, the sanction imposed by federal courts for failure to comply with Rule 5(a) is suppression of statements taken during the period of 'unnecessary delay.' Since § 3501 regulates suppression of such statements, it should be viewed as amending the meaning of 'unnecessary delay' as used in Rule 5(a), rather than leaving that term's meaning unchanged and simply allowing the Rule to be violated without sanction.

502 F.2d at 923 & n.5 (citation omitted). The panel then went on to address the admissibility of Gereau's confession, reasoning as follows:

> Section 3501 makes admissibility of confessions dependent on their voluntariness. Delay in a defendant's presentment to a magistrate is only one factor relevant to voluntariness. Section 3501(c) modifies the trial

> judge's freedom to determine voluntariness by stating certain instances in which the judge cannot on the basis of delay alone find a statement to have been involuntary. Statements not within the categories defined in § 3501(c) are not excluded but instead their admissibility is determined by the general standard of voluntariness set forth in § 3501(a) and (b). As set forth above, defendants have not demonstrated clear error in the district court's determination of voluntariness. We cannot, therefore, find that Gereau's statements . . . were improperly admitted.

Id. at 924 (citations omitted).

In *Gereau,* we read "shall not be inadmissible solely because of delay in bringing such person before a magistrate judge" in subsection (c) to refer to the voluntariness standard in subsections (a) and (b). That reading follows from the statement in subsection (a) that "a confession . . . shall be admissible in evidence if it is voluntarily given." Because subsection (a) makes voluntariness the sole criterion for admissibility of a confession, and subsection (b) further supports the statute's emphasis on voluntariness, it is certainly plausible to read the reference in subsection (c) to admissibility of a confession to refer to the voluntariness test. By our count, at least four other Courts of Appeals read the statute essentially the same way. *See United States v. Glover,* 104 F.3d 1570, 1583 (10th Cir. 1997) ("Voluntariness is the sole test for admissibility of a confession." (quoting *United*

States v. Shoemaker, 542 F.3d 561, 563 (10th Cir. 1976)); *United States v. Christopher*, 956 F.2d 536, 538-39 (6th Cir. 1991); *United States v. Beltran*, 761 F.2d 1, 8 (1st Cir. 1985); *United States v. Bear Killer*, 534 F.2d 1253, 1256-57 (8th Cir. 1976).[4]

Our statement in *Gereau* that § 3501 "amend[s] the meaning of 'unnecessary delay' as used in Rule 5(a)" meant that, in the context of deciding whether pre-presentment confessions given by defendants in federal custody are admissible at trial, § 3501 replaces the "unnecessary delay" standard with the voluntariness test in subsections (a) and (b) of the statute, in which the length and necessity of the presentment delay are factors in the analysis but not necessarily dispositive. The statute thus narrows the meaning of "unnecessary delay" by restricting it to delays that are part of making a defendant's

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[4] In his brief, Corley refers us to the Eighth Circuit Court's statement in *United States v. Hornbeck*, 118 F.3d 615, 619 (8th Cir. 1997), that "under 18 U.S.C. § 3501, Hornbeck's statement was properly admitted only if the following two requirements were met: First, the delay in bringing Hornbeck before a magistrate was reasonable. Second, Hornbeck's statement was voluntary." We read that statement, however, to refer to the circumstances under which the six-hour period may be extended, rather than to refer to the standards that apply to a confession elicited outside that period. In the paragraph preceding that statement, the Court noted that "[a] confession made more than six hours after arrest or detention may nevertheless be admissible if the confession was voluntary and the delay was reasonable, *taking into consideration the means of transportation and the travel distance to the nearest magistrate*." *Id.* at 618 (emphasis added).

statements "involuntary." In this vein, subsection (c) instructs courts that they may not find a confession involuntary "solely" because of the length of presentment delay where the confession is *otherwise* voluntary and where the delay is less than six hours (or longer than six hours but explained by transportation difficulties).

Under our reading of the statute, however, it is a misnomer to refer to the six-hour period in § 3501(c) as a "safe harbor," for although it reduces the likelihood that confessions given within six hours of arrest will be suppressed, it does not allow the police to act unreasonably in the pursuit of a confession. Delays designed to convey to the arrested person the message that his rights will not be honored until he confesses will affect the voluntariness of a confession. Police misconduct can render a confession involuntary, even if the defendant is presented to a magistrate within six hours of arrest. If, during a delay in presentment, police repeatedly interrogate a suspect and give the impression – explicitly or implicitly – that the promptness of presentment will depend on the suspect's cooperation, then that circumstance would weigh in favor of finding the confession involuntary. But, for example, if a delay in presentment is primarily spent providing an arrested person with necessary medical treatment, then that person is unlikely to suppose that he must confess to the crime before the police will honor his rights.

The bottom line is this: if an arrested person is detained for a substantial amount of time, then the

longer the delay continues, the more likely it becomes that the arrested person will feel improper pressure to confess. *Cf. Bear Killer,* 534 F.2d at 1257 ("[T]he simple fact of custody is coercive . . . ; [i]t is a subtle form of pressure that plays against the will of the suspect."). Subsection (c) merely instructs trial courts that the inherently coercive effect of a lengthy delay in presentment is not sufficient, *standing alone,* to render a confession involuntary where the delay is either less than six hours or "reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer." 18 U.S.C. § 3501(c). But where there are reasons other than the length of the delay to find a confession involuntary, the fact that the delay was less than six hours (or longer because of transportation difficulties) will not prevent a court from suppressing the confession.

D. Corley's Arguments and the Law in the Second, Ninth, and D.C. Circuits

As explained above, our reading of the statute in *Gereau* begins with the language in subsection (a) that "a confession . . . shall be admissible in evidence if it is voluntarily given," and reads the remainder of the statute in the context of that language. It therefore follows that "shall not be inadmissible solely because of delay in bringing such person before a magistrate judge" in subsection (c) refers to the voluntariness standard in subsections (a) and (b).

Corley disputes that reading, noting that three other Courts of Appeals – those in the Second, Ninth, and D.C. Circuits – understand that phrase in subsection (c) to refer to the *McNabb-Mallory* rule.[5] *See Alvarez-Sanchez*, 975 F.2d at 1402-03; *United States v. Perez*, 733 F.2d 1026, 1031 (2d Cir. 1984); *United States v. Robinson*, 439 F.2d 553, 563-64 (D.C. Cir. 1970); *see also United States v. Alvarez-Sanchez*, 511 U.S. 350, 361 & n.* (1994) (Ginsburg, J., concurring) (noting the split of authority). Instead of reading § 3501 in the context of subsection (a), those Courts begin with the language of subsection (c), which gives three conditions for the admissibility of a confession, only one of which is voluntariness, another being unreasonable delay. From this, they draw the negative inference that the absence of any of those conditions is a sufficient reason for suppressing the confession. *See Perez*, 733 F.2d at 1031. It therefore follows, they reason, that confessions given within the extendable six-hour period in subsection (c) are inadmissible only if they are involuntary; but confessions outside that period are subject to the *McNabb-Mallory*

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[5] The Seventh Circuit Court has taken an alternative approach, which we will not discuss at length, holding that a trial judge has discretion whether to suppress confessions elicited outside of the six-hour period. *United States v. Gaines*, 555 F.2d 618, 623-24 (7th Cir. 1977) ("Whatever the merits of the opposing approaches, we think it clear that a district judge retains discretion to exclude a confession where there is a delay in excess of six hours. However, the exercise of discretion depends on a congeries of factors, including such elements as the deterrent purpose of the exclusionary rule.").

rule and may be excluded if they are either (1) involuntary, or (2) voluntary but elicited after a period of "unnecessary delay" within the meaning of Rule 5(a), as it was applied under the *McNabb-Mallory* line of cases. Put differently, these Courts believe that "section 3501 legislatively overrule[s] the *McNabb-Mallory* rule only to the extent of (1) unreasonable pre-arraignment, pre-confession delays of less than six hours and (2) reasonable delays in excess of six hours." *Id.* at 1035.

Courts adopting that reading support it with three principal arguments. First, to read the statute to hold that voluntariness is the sole criterion for admissibility of a confession, those courts argue, is to subject all confessions to the same test for admissibility, thus making subsection (c) redundant of subsection (a) and rendering the six-hour period superfluous. *See Alvarez-Sanchez*, 975 F.2d at 1400 ("The difficulty with construing § 3501(a) literally . . . is that to do so would create a clear conflict with § 3501(c) and would render the latter section meaningless."); *Perez*, 733 F.2d at 1031 ("[A]ny reading of section 3501 that disputes unreasonable delay as an additional independent basis for suppression reads subsection (c) out of the statute.").

Second, these courts assert, subsection (a), read literally – *i.e.*, that confessions offered into evidence are subject to no constraints whatsoever other than voluntariness – is inherently implausible. For example, no court to our knowledge has suggested that Congress meant to create a blanket exception to the

Federal Rules of Evidence for voluntary confessions. Courts have therefore looked to the statute's purpose and legislative history to discern a reasonable limit for the scope of that provision. That legislative history suggests that subsection (a) was primarily meant to overrule *Miranda*, and that subsection (c) – and only subsection (c) – was meant to limit *McNabb-Mallory*. *See Alvarez-Sanchez*, 975 F.2d at 1402 ("[W]hile sections (a) and (c) are facially incompatible, they can be best understood by construing section (a) to address concerns regarding a confessor's free will and section (c) to address concerns regarding delay in arraignment. Such a construction is most consistent with the legislative history. . . .").

Third, there is no necessary correlation between the Government's reasons for a presentment delay and the voluntariness of a confession. *Alvarez-Sanchez*, 975 F.2d at 1400 ("The reasons for the delay – whether the delay was necessary or unnecessary – have no bearing, of course, on the confessor's state of mind."); *Perez*, 733 F.2d at 1031 ("[T]he government's excuses for the delay have no logical or legal relevance to the defendant's voluntariness.").

Our dissenting colleague cogently argues that the Second, Ninth, and D.C. Circuit Courts have the better of the argument regarding the proper interpretation of § 3501. Were we writing on a clean slate, we might agree. As explained above, however, our Court has already resolved these issues in *Gereau*.

The primary basis on which Corley would have us distinguish *Gereau* is that it relied for its holding on Second and Ninth Circuit precedent, which the Courts of Appeals in those Circuits have since repudiated.[6] While that may be a reason to revisit *Gereau en banc*, it is not a legitimate reason for a panel of this Court to refuse to follow *Gereau*. Although this case raises difficult legal questions to which Courts of

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[6] A District Court in our Circuit has made that argument as well. *See United States v. Superville*, 40 F. Supp. 2d 672, 687 & nn. 25-26 (D.V.I. 1999) ("*Gereau* relied almost exclusively on opinions from other Courts of Appeals that since have recognized their decisions as erroneous, which gives pause to question *Gereau*'s continued validity on this specific point.").

It is true that the Courts of Appeals for the Second and Ninth Circuits revised their readings of § 3501 without sitting *en banc*, but they did so against what those Courts viewed as a backdrop of circuit precedents that pointed in opposite directions. *See Alvarez-Sanchez*, 975 F.2d at 1404 ("On the basis of these . . . cases, it might be possible to conclude either that the law of the Ninth Circuit is that *McNabb-Mallory* applies to non-safe harbor confessions or that we have an intra-circuit conflict."); *Perez*, 733 F.2d at 1033, 1035 (discussing eight prior Second Circuit cases ruling on the presentment issue). Here, by contrast, we have only *Gereau*, and its directive is clear.

At oral argument, Corley also suggested that *Gereau* might be distinguished on its facts because in that case there was no allegation that the law enforcement officers deliberately delayed presenting Gereau to a magistrate judge for the purpose of extracting a confession. We are not persuaded. The *Gereau* panel directly addressed the question of how 18 U.S.C. § 3501(c) applies to pre-presentment confessions elicited outside of the six-hour period between arrest and presentment, and held that those confessions are subject to the "voluntariness" test in subsections (a) and (b) of the statute. 502 F.2d at 924.

Appeals have given different answers, we are not bound by the decisions in our sister Circuits, and where no subsequent decisions of the Supreme Court or substantive amendments to the statute have undermined our holding in *Gereau,* we follow it. *See* Third Circuit I.O.P. 9.1; *Reich v. D.M. Sabia Co.,* 90 F.3d 854, 858 (3d Cir. 1996).

* * *

In this case, the District Court found that although the police officers questioned Corley before presenting him to a magistrate judge, and although part of the delay in presentment was for the purpose of getting Corley to confess, his confessions were voluntarily given. Corley does not seriously dispute that finding, and we discern no error in it. Following *Gereau,* we must therefore affirm Corley's conviction.[7]

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[7] In light of our holding, it is unnecessary for us to address the District Court's holding that Corley's oral confession should be treated as having been made within six hours of arrest. Although that conclusion is contrary to the text of the statute – which provides that the only reasons for extending the six-hour period are those relating to transportation or to the availability of a magistrate judge or other officer – we understand the District Court to have held that both of Corley's confessions were voluntary. The second confession was clearly made more than six hours after arrest, and the District Court held that the delay in presentment still did not render Corley's confession involuntary.

III. Sentence

Corley argues that he is entitled to a remand for resentencing for two reasons: (1) he was sentenced before the Supreme Court decided *Booker,* and our decision in *United States v. Davis,* 407 F.3d 162 (3d Cir. 2005) (*en banc*), requires resentencing, and (2) the District Court failed to resolve a disputed firearm objection, as Fed. R. Crim. P. 32(i)(3)(B) requires. We disagree with both contentions.

A. The Validity of Corley's Sentence Under *Booker* and *Davis*

In *Blakely v. Washington,* 542 U.S. 296 (2004), the Supreme Court applied the Sixth Amendment principle it announced in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), to invalidate a sentence imposed under Washington state law. In so doing, it raised doubts about the constitutionality of the United States Sentencing Guidelines in light of their similarity to the Washington scheme. The Court resolved those doubts in *United States v. Booker,* 543 U.S. 220 (2005). It held that mandatory enhancement of a sentence under the Guidelines, based on facts found by a sentencing court alone, violates the Sixth Amendment. *Id.* at 244. The Court went on to hold that the remedy for this constitutional defect in the Guidelines is to render them advisory by excising from the Federal Sentencing Act those provisions that made the Guidelines mandatory. *Id.* at 245-46.

Within months after the Supreme Court decided *Booker*, we explained in *Davis* that "[d]irect appeals of sentences imposed before *Booker* generally present two kinds of claims: first, defendants whose sentences were enhanced by judicial factfinding raise Sixth Amendment claims; second, defendants who contend the District Courts erroneously treated the Guidelines as mandatory rather than advisory." 407 F.3d at 163-64. In reviewing claims of error of the second type,[8] we presume that a defendant sentenced under the mandatory Guidelines suffered prejudice. We do so because we "cannot ascertain whether the District Court would have imposed a greater or lesser sentence under an advisory framework." *Id.* at 164-65.

By contrast, "where . . . a District Court clearly indicates that an alternative sentence would be identical to the sentence imposed under the

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[8] We do not understand Corley to allege the first type of error, but to the extent that he does, that argument cannot succeed because his sentence was below the statutory maximum authorized on the basis of the facts found by the jury. *See Booker*, 543 U.S. at 233 ("If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."); *United States v. Grier*, 475 F.3d 556, 562 (3d Cir. 2007) (*en banc*) ("Judicial factfinding in the course of selecting a sentence within the permissible range does not offend the Fifth and Sixth Amendment rights to a jury trial and proof beyond a reasonable doubt.").

Guidelines, any error that may attach to a defendant's sentence under *Booker* is harmless." *United States v. Hill,* 411 F.3d 425, 426 (3d Cir. 2005). It is true, as Corley points out, that where a district court imposed a sentence prior to *Booker,* and did not make sufficiently clear what sentence it would impose if the Guidelines were not binding, we have vacated the sentence and remanded for resentencing. Here, however, we are left with no doubt that the District Court considered the Guidelines advisory, and *Davis* therefore does not apply. Moreover, the Court here followed precisely the procedure we now require district courts to follow after *Booker. See United States v. Gunter,* 462 F.3d 237, 247 (3d Cir. 2006) (courts must: first, calculate the applicable Guidelines range, second, formally rule on any departure motions, and third, exercise their post-*Booker* discretion, considering the factors in 18 U.S.C. § 3553(a), in setting a sentence). The District Court calculated the applicable Guidelines range and imposed a sentence that it considered appropriate in light of "all the conduct, prior history of this particular defendant, or any defendant that's in front of me, and I take all that into account when I fashion my sentence."

Corley contends, however, that the District Court's explanation is lacking because it did not cite 18 U.S.C. § 3553(a) and did not go into detail in explaining its reasons for the sentence it imposed. As we explained in *Cooper,* however, we do not require district courts to make specific findings on all of the § 3553(a) factors, so long as the record shows that the

court took into account those factors properly raised by the parties at the time of sentencing. 437 F.3d at 329; *see also United States v. Dragon*, 471 F.3d 501, 505-06 (3d Cir. 2006); *United States v. Jackson*, 467 F.3d 834, 842 (3d Cir. 2006).

The Supreme Court explained recently that when a district court imposes a sentence within the advisory Guidelines range, the requirement in 18 U.S.C. § 3553(c) that a sentencing judge give a statement of reasons should not be read "as insisting upon a full opinion in every case." *Rita v. United States*, 127 S. Ct. 2456, 2468 (2007). Instead, "[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority." *Id.*

In this case, we are satisfied that the record the District Court made at sentencing meets that standard and reflects that it gave appropriate consideration to Corley's arguments and to the information before it. For that reason, and for the reasons noted above, we reject Corley's argument that he is entitled to a remand under *Davis*.

B. Whether the District Court Failed to Resolve a Disputed Firearm Objection

Federal Rule of Criminal Procedure 32(i)(3)(B) provides that the sentencing court "must – for any disputed portion of the presentence report or other controverted matter – rule on the dispute or

determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing." The purpose of the Rule is to "ensure that the defendant's sentence is based on accurate and reliable information and that subsequent recipients of the report are aware of whatever resolutions occurred at sentencing." *United States v. Rosa,* 891 F.2d 1063, 1070 (3d Cir. 1989) (quoting *Kramer v. United States,* 798 F.2d 192, 194 (7th Cir. 1986)); *see also United States v. Furst,* 918 F.2d 400, 406 (3d Cir. 1990). We enforce the Rule strictly, and "failure to comply with it is grounds for vacating the sentence." *United States v. Electrodyne Sys. Corp.,* 147 F.3d 250, 255 (3d Cir. 1998); *see, e.g., United States v. Leahy,* 445 F.3d 634, 663-64 (3d Cir. 2006) (remanding where the court of appeals could not determine what method the district court used to calculate the amount of loss in a bank fraud case); *Electrodyne,* 147 F.3d at 255 (remanding where the district court's basis for rejecting the defendant's arguments was ambiguous); *Rosa,* 891 F.2d at 1069-70 (remanding where a defendant disputed certain facts in the presentence report's narrative and the District Court did not expressly rule on them).

In this case, Corley contends that the District Court failed to rule expressly on whether he merited a three-level or a five-level enhancement under U.S.S.G. § 2B3.1(b)(2). That provision of the Guidelines calls for a five-level enhancement to the defendant's base offense level "if a *firearm* was brandished

or otherwise possessed," but for a three-level enhancement "if a *dangerous weapon* was brandished or possessed." *Id.* §§ 2B3.1(b)(2)(C), (E) (emphases added). The transcript of the sentencing hearing shows unambiguously, however, that the District Court found that Corley possessed a firearm rather than a dangerous weapon, and that it based that finding on Corley's statement and on the testimony of employees of the credit union that was robbed.

Both Corley and the Government indicated that they had no objection to the narrative portion of the presentence report. J.A. 461. As for the calculation of Corley's advisory Guidelines range, the parties disputed two matters: (1) whether to enhance Corley's offense level by two levels under § 3C1.2 for having endangered his daughter while resisting arrest, and (2) whether to enhance the offense level by five or three levels under § 2B3.1(b)(2). The Government's position at sentencing was that Corley's offense level should be 30, reflecting a two-level enhancement under § 3C1.2, and a five-level enhancement under § 2B3.1(b)(2). Corley responded that his offense level should be 26, reflecting no enhancement under § 3C1.2 (as his conduct in endangering his daughter was taken into account at his sentencing in a separate case for assaulting a federal officer), and a three-level enhancement under § 2B3.1(b)(2), because the jury acquitted him of the charge of carrying a firearm in furtherance of a drug trafficking crime, and there

was scant evidence that he possessed a firearm instead of merely a dangerous weapon.[9]

> The Government responded:
>
> There's 3 reasons why. The conspiracy liability theory, the testimony of the employees of the credit union, and the defendant's own statement.

J.A. 475. The District Court resolved both disputes by stating:

> If I were to apply the guidelines I will tell you right now[,] based on the defendant's statements or written statements, the testimony in court, I would have – I would find that he's a category 6 and a level 28. I would not give him the 2 extra points on the fleeing because I think that was taken into account by Judge Bartle on his prior sentence. So as far as I'm concerned if I were to use the guidelines, he'd be a category 6, level 28, 140 to 175 [months].

J.A. 480-81 (emphasis added). In the second sentence of the quoted passage, the District Court unmistakably resolved the issue of the § 3C1.2 enhancement in

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[9] As noted, Corley argued at sentencing that *Blakely* precluded the District Court from applying any Guideline enhancements predicated on facts not specifically found by the jury, and that his base offense level was therefore 21. J.A. 464-65, 474. Once the District Court rejected that argument, however, Corley's position was that his base offense level should be 26. J.A. 474.

Corley's favor. The remainder of the quoted passage, read in the context of the discussion preceding it, reflects that the Court decided the § 2B3.1(b)(2) enhancement against Corley, finding that he possessed a firearm instead of a dangerous weapon. We therefore hold that the District Court did not fail to comply with Fed. R. Crim. P. 32(i)(3)(B).

IV. Restitution

The final issue we address is whether the District Court impermissibly delegated to the Bureau of Prisons its duty under § 206 of the MVRA, 18 U.S.C. § 3664(f), to set the manner and schedule of restitution payments during Corley's imprisonment. Though what the District Court did here makes sense practically, it runs afoul of prior precedent of our Court and the language of the MVRA. We therefore order a limited remand so that the District Court can set a restitution schedule.

In its sentencing order, the District Court ordered Corley to pay $47,532.36 (the amount of money taken in the credit union robbery) in restitution, a fine of $500, and a special assessment of $200.[10] The presentence report – which the District Court adopted in large part[11] – indicated that Corley was

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[10] The $200 special assessment was mandatory under 18 U.S.C. § 3013(a)(2)(A). *See* PSR at 15, ¶ 68.

[11] In the Statement of Reasons, it checked a box indicating that it adopted the presentence report, with the only change

(Continued on following page)

indigent at the time of sentencing[12] and concluded that he "does not have the financial wherewithal to pay a fine within the sentencing guideline range, however[,] a nominal fine could be paid on an installment basis while in custody and while under supervision in the community."[13] PSR at 13, ¶ 56. The District Court calculated the fine under the Guidelines to be between $12,500 and $125,000, but imposed a fine of $500 and checked a box on the Statement of Reasons (Form AO 245B) to indicate that the fine was "waived or below the guideline range because of inability to pay."

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being that "Blakely v. Washington was applied." In evaluating whether the District Court's order complied with 18 U.S.C. § 3664(f), we may therefore look to the statements in the presentence report that it adopted. *United States v. Lessner*, No. 06-1030, ___ F.3d ___, slip op. at 25-28 (3d Cir. Aug. 8, 2007) (examining the presentence report and the hearing transcript to determine whether the District Court complied with the requirement in § 3664(f) that it consider the defendant's ability to pay when setting the schedule of restitution payments).

[12] The presentence report states that "[a] nationwide search for assets was negative," Corley had no credit history, and that social security records reflected no income for him during seven of the previous eleven years and a total of approximately $5,600 during the other four years. PSR at 12-13, ¶¶ 53-55.

[13] Although the presentence report notes that Corley did not file the affidavit required under 18 U.S.C. § 3664(d)(3), and states that "it should be assumed that the defendant has the financial wherewithal to pay a fine within the guideline range, as he has not established an inability to do so," PSR at 13, ¶ 54, the probation office appears to have concluded on the basis of its own investigation that Corley could not pay a fine within the Guideline range. PSR at 13, ¶ 56.

Regarding the schedule of payments for restitution and the fine, however, the Court ordered "[p]ayment to begin immediately," subject to the following additional instructions:

> The defendant shall make restitution and fine payments from any wages he may earn in prison in accordance with the Bureau of Prisons Inmate Financial Responsibility Program. The restitution and fine shall be due immediately. Any balance remaining upon release from custody shall be paid at a rate of no less than $100.00 per month.

J.A. 15. Corley argues that the first sentence quoted above constitutes an impermissible delegation of authority to the Bureau of Prisons.

18 U.S.C. §§ 3556, 3663A(a)(1), in the MVRA require district courts to order restitution for certain crimes, including those – such as Corley's – "in which an identifiable victim or victims has suffered a physical injury or pecuniary loss." *Id.* § 3663A(c)(1)(B). The court may not consider the defendant's economic circumstances when it calculates the *amount* of restitution, *id.* § 3664(f)(1)(A), but after setting the amount, the court "shall, pursuant to section 3572,[14]

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[14] 18 U.S.C. § 3572(d)(1) provides that a defendant sentenced to pay a monetary penalty "shall make such payment immediately, unless, in the interest of justice, the court provides for payment on a date certain or in installments." If the sentencing court allows the defendant to defer payment in any way, "the length of time over which scheduled payments will be made shall be set by the court, but shall be the shortest time in which

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specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid" in consideration of the defendant's current and anticipated financial situation. *Id.* § 3664(f)(2) (footnote added).

In our decisions interpreting the MVRA, we have held that the plain language of section 3664(f) – stating that "the court shall" order restitution and specify the manner and schedule of payments – means that ordering restitution is a judicial function that cannot be delegated, in whole or in part. *United States v. Coates,* 178 F.3d 681, 684-85 (3d Cir. 1999); *see also Lessner,* No. 06-1030, ___ F.3d at ___, slip op. at 26 (citing *Coates*). In *Coates,* we held that it was plain error for the District Court to direct the defendant to pay a fixed sum without indicating a payment schedule. 178 F.3d at 684. We explicitly rejected the Government's alternative argument that "through its silence, the Court delegated responsibility to establish a payment schedule to the probation office." *Id.* We held that any such delegation was impermissible because "the fixing of restitution payments is a judicial act that may not be delegated," and that "the plain language" of § 3664(f) "contradicts, and thus overrides," the federal regulations permitting the Bureau of Prisons to make payment schedules for

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full payment can reasonably be made." *Id.* § 3572(d)(2). The court may order payment in a single lump sum, periodic payments, "in-kind" payments, or – if the defendant is indigent – "nominal periodic payments." *Id.* § 3664(f)(3)(A)-(B).

restitution through the IFRP, 28 C.F.R. §§ 545.10-11. *Id.* at 685.

Other courts of appeals have found impermissible delegations of authority under similar circumstances. *See, e.g., United States v. Gunning,* 401 F.3d 1145, 1150 (9th Cir. 2005) (finding impermissible delegation where the restitution order failed to provide a payment schedule during the period of the defendant's incarceration); *United States v. Overholt,* 307 F.3d 1231, 1255 (10th Cir. 2002) (finding impermissible delegation where the restitution order directed that "[r]estitution shall be paid in full immediately[, and a]ny amount not paid immediately shall be paid while in custody through the Bureau of Prisons' Inmate Financial Responsibility Program."); *United States v. Pandiello,* 184 F.3d 682, 688 (7th Cir. 1999) (same, where the restitution order directed payment "in equal monthly installments during the period of incarceration through the Inmate Financial Responsibility Program," without fixing the amount of the installments).

We are compelled by our holding in *Coates* to find that there was an impermissible delegation here. Although the District Court discharged its responsibility to fix the amount of restitution and the schedule of payments once Corley is released, by its terms the order delegates to the Bureau of Prisons the task of determining how Corley will pay his obligations while he is in prison. As such, we must order a remand.

Against that conclusion, the Government argues that the District Court's order was proper because it ordered that "[t]he restitution and fines shall be due immediately." Because the MVRA permits sentencing courts to order immediate payment, rather than payment on an installment schedule, the Government argues, the District Court may order immediate payment with the understanding that the defendant will make payments to the extent he can in good faith. The Bureau of Prisons may permissibly ensure through the Responsibility Program that the defendant makes satisfactory progress toward his obligations while he is in prison.

We disagree. In support of its argument, the Government relies on three of our recent non-precedential opinions.[15] By the very fact these opinions are not precedential, they do not bind our Court. The principal case that supplies the reasoning for those opinions is *McGhee v. Clark,* 166 F.3d 884 (7th Cir. 1999). In *McGhee,* however, the defendant's conviction came before the effective date of the MVRA, and he was therefore sentenced under the MVRA's predecessor statute, the Victim and Witness Protection Act of 1982 (VWPA), Pub. L. No. 97-291, 96 Stat. 1248. Under the VWPA, the sentencing court was not required to set the schedule of restitution payments. *See United States v. Ahmad,* 2 F.3d 245,

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[15] *See United States v. Jackson-El,* 179 Fed. Appx. 147 (3d Cir. 2006); *United States v. Walker,* 149 Fed. Appx. 55 (3d Cir. 2005); *Henry v. Apker,* 128 Fed. Appx. 895 (3d Cir. 2005).

249 (7th Cir. 1993) (Easterbrook, J.) ("Yet § 3663 does not require courts to establish schedules of any kind. A judge 'may', but need not, establish a schedule."). Although the court could not explicitly delegate the scheduling of payments to the probation office, *United States v. Graham,* 72 F.3d 352, 356-57 (3d Cir. 1995), it could specify the amount due without elaboration. As Judge Easterbrook explained:

> A judgment in civil litigation specifies the amount due without elaboration. If immediate payment proves impossible, accommodation will occur in the course of collection. A judgment creditor will garnish the judgment debtor's wages and collect incrementally, even though the court has not said a word about installments. Just so with criminal restitution. If the sentence specifies the amount of restitution, without elaboration, and makes payment a condition of supervised release, the probation officer will assess the defendant's progress toward satisfaction of his debt, and if the defendant is not paying what he can the probation officer will ask the judge to revoke or alter the terms of release. Then the judge may make the order more specific or, if the defendant has not paid back what he could in good faith, may send him back to prison. Everything works nicely without any effort to establish installments on the date of sentencing and without delegating a judicial function to the probation officer.

Ahmad, 2 F.3d at 249. Under the MVRA, however, that option is no longer available. *See United States v. Davis,* 306 F.3d 398, 425-26 (6th Cir. 2002) (discussing the differences between the VWPA and the MVRA); *United States v. McGlothlin,* 249 F.3d 783, 785 (8th Cir. 2001) (same); *Coates,* 178 F.3d at 684 (rejecting the argument that a district court may satisfy its obligation under 18 U.S.C. § 3664(f)(2) by specifying the amount due without elaboration). Section 3664(f)(2) requires the sentencing court to "specify in the restitution order the manner in which, and the schedule according to which, the restitution is to be paid," in consideration of the defendant's economic circumstances. Although the court may order immediate payment in full of the entire amount of restitution, *id.* §§ 3572(d)(1), 3664(f)(3)(A), it may only do so "in consideration of" the defendant's finances. *Id.* § 3664(f)(2); *see also Coates,* 178 F.3d at 684 ("Contrary to the government's suggestion, however, this provision [§ 3572(d)] in no way eliminates the district court's obligation under section 3664 – 'Procedure for issuance and enforcement of order of restitution' – to consider the defendant's financial situation and schedule restitution payments accordingly.").

In this case, the presentence report – which the District Court adopted – reflected that Corley was indigent and that any payments he could make toward his restitution obligation would necessarily come almost entirely from any wages he might make in prison. The District Court's order reducing the

amount of Corley's fine, directing that he "make restitution and fine payments from any wages he may earn in prison in accordance with the Bureau of Prisons Inmate Financial Responsibility Program," and ordering him to pay in installments upon his release from prison, reflects that understanding. Because the District Court apparently understood that Corley could not make immediate payment in full, it was required under § 3664(f)(2) to set a different schedule of payments. As the Eleventh Circuit Court has explained, orders directing "immediate" payment under such circumstances are indistinguishable in principle from outright delegations of authority to the Bureau of Prisons:

> [I]f the statute does not permit delegation to the probation office, we cannot endorse a restitution order requiring "immediate" payment with an informal understanding that the probation office shall set a payment schedule. Obviously, the availability of such an option would in practice defeat the statutory requirement that the court establish any installment schedule.

United States v. Prouty, 303 F.3d 1249, 1255 (11th Cir. 2002). That appears to be what happened here.

We understand that our result may cause practical difficulties for district courts in the future. In this case, the District Court had a limited amount of information before it at the time of sentencing, and could not predict with any certainty whether Corley would choose to participate in the Responsibility

Program, how much he would earn if he participated, or when he would be paid. It is therefore difficult to fault the Court for linking Corley's payment schedule to the contingency of his earning wages in prison.[16]

The District Court is not completely without assistance at the time of sentencing, however. To aid it in setting an appropriate payment schedule, § 3664(a) and Fed. R. Crim. P. 32(c)(1)(B), (d)(2)(B) contemplate having the probation office investigate

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[16] It appears from the presentence report that the Bureau of Prisons enjoys relatively little discretion under the Responsibility Program. According to the presentence report, Corley would likely earn approximately $300 per year in prison, of which the Bureau of Prisons would apply a minimum of $100 and a maximum of 50% toward Corley's restitution payments. Fifty percent of $300 is $150, so to the extent that the District Court's order delegated any responsibility to the Bureau of Prisons, that delegation likely consists only of allowing the Bureau to decide precisely what amount between $100 and $150 *per year* Corley should pay toward his total obligation of $48,200.36.

The Eighth Circuit Court has approved of a restitution order under similar circumstances, where the district court ordered that, during the defendant's incarceration, restitution would be paid "on an installment basis in the way the Bureau of Prisons handles this through its Inmate Financial Responsibility Program at the rate of no less than 50% of the funds available to defendant during incarceration." *United States v. Vanhorn*, 344 F.3d 729-30 (8th Cir. 2003). Judge Bye dissented, however, noting that "[i]t is entirely up to the Bureau of Prisons to choose an amount between 50% and 100% of the funds available to Vanhorn," and opining that "[a] floor [of 50%] is not a schedule, and it cedes too much authority to the Bureau of Prisons." *Id.* at 732 (Bye, J., dissenting). Judge Bye's view is consistent with our holding in *Coates*.

various circumstances pertinent to restitution, including the defendant's economic situation, and to report its findings in the presentence report. Section 3664(d)(3) requires defendants to prepare and file with the probation officer an affidavit detailing their financial resources. Should the defendant's circumstances change after sentencing, § 3664(k) provides that the defendant must – and the Government may – so notify the court, and it may "adjust the payment schedule, or require immediate payment in full, as the interests of justice require."

As Judge Hodges noted in *Prouty*, those statutory provisions do not solve the problem completely, and finding an impermissible delegation under the circumstances of this case may seem illogical or at least inefficient:

> [T]o my mind, that prohibition is entirely illogical when one considers that in many cases – where the defendant has no presently discernable assets and a lengthy term of commitment is imposed – there will be little or no factual basis upon which to fashion a reasoned payment schedule of any kind. To delegate oversight of the payment protocol to the probation officer, amenable to adjustment over time and subject always to judicial approval, would make perfectly good sense. I acknowledge, however, that the statutory scheme also supplies one apparent solution to this problem by (a) providing in 18 U.S.C. § 3664(f)(3)(B) that the court may direct

> "nominal periodic payments;" and by (b) providing in 18 U.S.C. § 3664(k) that the court may "adjust the payment schedule, or require immediate payment in full, as the interests of justice require" upon learning . . . that there has been "a material change in the defendant's economic circumstances." Thus, in a case like this one, the sentencing court could elect to impose nominal payments during the period of incarceration and thereafter until such time as the court is notified . . . that there has been a change in the defendant's ability to pay.

303 F.3d at 1256 (Hodges, J., concurring); *see also Overholt*, 307 F.3d at 1256 (suggesting that the practical difficulties with the prohibition against delegation are ameliorated somewhat by the provisions of § 3664 requiring the defendant and the probation office to furnish the court with information regarding the defendant's ability to pay, and by § 3664(k), which allows the court to adjust the payment schedule). Despite these difficulties, however, the result we reach today is compelled by our holding in *Coates* and by the language of the MVRA.

V. Conclusion

Following our decision in *Gereau*, we hold that the admissibility of Corley's confessions depends on whether they were voluntary within the meaning of § 3501(a)-(b). Finding no error in the District Court's conclusion that the confessions were voluntary, we

uphold its decision to allow them into evidence at Corley's trial, and we affirm Corley's convictions.

We also hold that Corley is not entitled to a remand for resentencing under our decision in *Davis* because the District Court correctly treated the Guidelines as advisory and provided a sufficient explanation for the sentence it imposed. In addition, Corley is not entitled to a remand under Fed. R. Crim. P. 32(i)(3)(B) because the District Court did not fail to resolve his objection to the proposed enhancement under U.S.S.G. § 2B3.1(b)(2) in calculating his sentencing range.

Finally, the District Court impermissibly delegated its duty under the MVRA to schedule restitution payments to the Bureau of Prisons (and, in doing so, did not consider Corley's economic circumstances). We therefore remand for the Court to set that schedule under 18 U.S.C. § 3664(f).

United States v. Johnnie Corley, No. 04-4716

SLOVITER, *Circuit Judge, dissenting.*

The principal issue on this appeal, the amount of time that may elapse before the arresting officers must present a defendant to a federal magistrate judge, not only divides this panel – it is also the subject of a circuit split. In the past, the permissible scope of post-arrest investigation has been called "the most difficult problem in criminal procedure," 1 Charles Alan Wright, *Federal Practice and Procedure*

(Criminal) § 72, at 117 (3d ed. 1999) (quoting a draft edition of the American Law Institute's Model Code of Pre-Arraignment Procedure), and it remains a vexing issue.

The District Court concluded that federal law enforcement officers did not unreasonably delay in presenting the appellant, Johnnie Corley, to a federal magistrate judge and it therefore denied Corley's motion to suppress the two statements Corley made before he was brought to the magistrate judge. Because I believe that the majority decision is inconsistent with two Supreme Court decisions that remain viable and precedential and that the majority erroneously interprets the statute enacted after those decisions in a manner that renders much of the statutory language superfluous, I dissent. The majority suggests that my reading of the statute, which accords with that of the Courts of Appeals for the Second, Ninth, and D.C. Circuits, might be the better interpretation of the statute, *see* Maj. Typescript Op. at 23, but believes we are bound by one sentence in an earlier opinion. If that is so, it may be appropriate to consider the issue en banc. It is important not only to Corley[17] but to all arresting officers operating in this circuit.[18]

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[17] Corley argues, and the government does not disagree, that there is no evidence independent of the confession of Corley's guilt.

[18] I accept the majority's statement of the facts, I limit my discussion to the legal issue.

I.[19]

A defendant's right to presentment before a neutral judicial officer after the defendant's arrest was first considered by the Supreme Court in *McNabb v. United States,* 318 U.S. 332 (1943). In that case, federal officers were investigating the murder of an officer of the Alcohol Tax Unit of the Bureau of Internal Revenue who was killed in the Tennessee mountains while he was seeking a still where illegal whiskey was being made. Attention soon centered on the McNabb family; four of them were arrested on the day after the killing and the fifth surrendered the next day.

They were interrogated sporadically over several days and confessed before being brought before a United States commissioner or a judicial officer some days later.[20] They were tried and three of the five were convicted of second degree murder in federal court, after the trial judge denied their motions to suppress the confessions. When the case came before the Supreme Court, Justice Frankfurter used the opportunity to engage in a discourse with respect to the need for the police to observe the procedural safeguards established by Congress for the effective

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[19] The District Court had jurisdiction over this case pursuant to 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

[20] Justice Reed noted in his dissenting opinion that the record did not establish when the petitioners were taken before a committing magistrate. *Id.* at 349.

administration of criminal justice. *Id.* at 347. A federal statute authorizing officers of the Federal Bureau of Investigation to make arrests required that "the person arrested shall be immediately taken before a committing officer." *Id.* at 342 (quoting former 5 U.S.C. § 300a). Nearly all the states had similar legislation. *Id.*

Justice Frankfurter stated, "[p]lainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law." *Id.* at 345. Although the Court stated that the "mere fact that a confession was made while in the custody of the police does not render it inadmissible," it held that when the evidence was obtained in violation of the defendant's legal rights, it must be excluded. *Id.* at 345-46. The Court thus overturned the conviction.

The advisory committee on the Federal Rules of Criminal Procedure did not immediately codify the *McNabb* decision, as there was significant debate as to the extent of the holding. *See* Wright, Fed. Prac. & Pro. § 72, at 119-23. In 1946, more than a decade after the *McNabb* decision, Rule 5(a) of the Federal Rules of Criminal Procedure was finally adopted. Professor Wright states that "[t]he requirement of Rule 5(a) that an arrested person be taken before the commissioner – or magistrate judge as he is now called – 'without unnecessary delay' was once the most controversial provision of the Criminal Rules."

Id. at 117. That Rule now provides that "[a] person making an arrest within the United States must take the defendant *without unnecessary delay* before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise." Fed. R. Crim. P. 5(a)(1)(A) (emphasis added). The advisory committee's note explains that this language "reflects the view that time is of the essence." Fed. R. Crim. P. 5 advisory committee's note.

Shortly after the adoption of Rule 5(a), the Supreme Court confirmed that confessions obtained when a defendant was not brought promptly before a committing magistrate are inadmissible under the *McNabb* rule. *See Upshaw v. United States,* 335 U.S. 410 (1948). Although the Court had previously stated in *United States v. Mitchell,* 322 U.S. 65 (1944), that a confession made within a few minutes after the defendant was taken to the police station was admissible, even though the defendant was thereafter held eight days before being taken to a committing magistrate, the *Upshaw* Court rejected the court of appeals' interpretation of *McNabb* as holding that a confession voluntarily given is admissible in evidence. Instead, the Court in *Upshaw* explained that the *Mitchell* confession had been made before any illegal detention had occurred. It stated that, in contrast, it was clear that the delay in bringing Upshaw promptly before a committing magistrate was for the purpose of securing the confession, a purpose inconsistent with the requirement to bring the defendant before the

magistrate "without unnecessary delay" as required by Rule 5(a). It reaffirmed that "confessions thus obtained are inadmissible under the *McNabb* rule." *Id.* at 414.

Professor Wright notes that even after the *Upshaw* decision, "the lower courts continued to be uncertain about the reach of the exclusionary rule, and were reluctant to believe that mere delay in bringing a defendant before a commissioner could, without more, prevent use of a confession obtained in the interim." Wright, Fed. Prac. & Pro. § 72, at 124. The decision in *Mallory v. United States,* 354 U.S. 449 (1957), resolved some of the confusion as to the meaning of the exclusionary rule first announced in *McNabb.*

Mallory was convicted by a jury in the United States District Court for the District of Columbia of rape and sentenced to death. He argued that his confession, obtained by the police following a detention of some seven hours, should be suppressed because he was not brought before a commissioner until the next morning, and the police did not attempt to reach a commissioner until seven and a half or eight hours after his arrest, when the commissioner was no longer available. In its decision, the Supreme Court reviewed what it characterized as the "plainly defined" scheme for initiating a federal prosecution:

> The police may not arrest upon mere suspicion but only on "probable cause." The next

> step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so *that he may be advised of his rights and so that the issue of probable cause may be promptly determined.* The arrested person may, of course, be "booked" by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.

Id. at 454 (emphasis added).

The Court noted that an earlier arraignment[21] could easily have been had in the same building in which the police headquarters were housed, and rejected the explanation that the police were merely trying to check on the information given by the petitioner. The Court held it was error not to have suppressed Mallory's confession.

It should be noted that the defendants in *McNabb, Upshaw,* and *Mallory* had not been advised of their rights. Those cases were all decided before the Supreme Court's decision in *Miranda v. Arizona,* 384 U.S. 436 (1966), which alleviated some of the

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[21] The Wright treatise suggests that the term "arraignment" is more properly confined to the proceeding covered in Rule 10 when defendant is read the charges and enters a plea, but it states that "the other usage has now become so common that there is little likelihood it will be abandoned." Wright, Fed. Prac. & Pro. § 71, at 115.

problems identified in those decisions. Nonetheless, the significance of prompt presentation to a magistrate judge is not diminished.

After the *Mallory* decision, Congress turned its attention to the issue of pre-presentation delay and, in particular, to the admissibility of confessions by detained arrestees who were not brought before a judicial officer without unreasonable delay. In the original draft of what was later enacted as Title II of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 3501-3502, voluntariness was the only criterion for admission of such confessions. *See United States v. Superville,* 40 F. Supp. 2d 672, 682-83 (D.V.I. 1999) (discussing legislative history). However, amendments made on the Senate floor restored the essence of the *McNabb-Mallory* exclusionary rule. Thus, the federal statute, codified in 18 U.S.C. § 3501, was enacted essentially as it appears today.

18 U.S.C. § 3501(a) provides that "In any criminal prosecution brought by the United States or by the District of Columbia, a confession . . . shall be admissible in evidence if it is voluntarily given."[22]

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[22] Subsection (a) provides in full: "In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit

(Continued on following page)

Subsection (b) provides that "[t]he trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession," and sets forth five factors that "need not be conclusive on the issue[.]" 18 U.S.C. § 3501(b).[23]

Finally, subsection(c), the section of principal relevance to us today, provides a safe harbor, stating, in relevant part:

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the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." Subsection (c) in turn explains that, "[a]s used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing."

[23] Subsection (b) provides in full: "The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."

> In any criminal prosecution by the United States . . . , a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States . . . if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury *and if such confession was made or given by such person within six hours immediately following his arrest or other detention: Provided,* That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer.

18 U.S.C. § 3501(c) (emphasis added).

As the court aptly noted in *Superville,* "Congress flatly refused to 'overrule' *McNabb* or *Mallory*. . . . and 18 U.S.C. § 3501(c) only excised the first six hours after arrest or detention from the scope of the *McNabb-Mallory* exclusionary rule." 40 F. Supp. 2d at 683.

The majority chooses not to dispute Corley's argument that the District Court erred in concluding that the agents' interrogation was within that six-hour safe-harbor period. *See* Maj. Typescript Op. at 25 note 7. As the majority opinion notes, Corley was arrested at 8:00 a.m. and was taken to the Sharon Hill police station for processing. He was then escorted at approximately 11:45 a.m. from the police station to the hospital where he was admitted at 12:12 p.m. [4 hours and 12 minutes after the arrest]. He was discharged from the hospital at approximately 3:20 p.m. after receiving five sutures. [7 hours and 20 minutes after the arrest]. Corley arrived at the Philadelphia Federal Bureau of Investigation office at 3:30 p.m. [7½ hours after the arrest]. At 5:07 p.m., the officers advised Corley of his *Miranda* rights, and he was given the advice of rights form. From 5:27 p.m. through 6:38 p.m., Corley orally confessed to the June 16, 2003 bank robbery. [Confession began 9 hours, 27 minutes after the arrest].

It is evident that Corley's first confession was not made within six hours of his arrest as that period expired at 2:00 p.m. In reaching its conclusion that Corley's confession fell within the safe-harbor period, the District Court excluded the time during which Corley was treated at the hospital. There is no legal basis for that exclusion. The statute does not provide an exception for emergency visits to the hospital.[24]

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[24] Even were the time spent receiving medical treatment excluded in calculating the expiration of the safe-harbor period,

(Continued on following page)

There is only one statutory proviso to the safe harbor, and that proviso states that the six-hour time limitation "shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer." 18 U.S.C. § 3501(c). The government does not contend that the delay in presenting Corley to the Magistrate Judge was related "to the means of transportation and the distance to be traveled to the nearest available magistrate."

The District Court also stated that the delay in presenting Corley to the Magistrate Judge was not "unnecessary" for the purposes of Rule (5)(a) because Corley requested the break after beginning his confession. App. at 6. Once again, there is no statutory provision that time requested by the defendant should be excluded from the six-hour safe harbor. Indeed, at the argument before us the government retreated from the position taken in its brief and conceded that the District Court erred in concluding that the statement was made within the safe harbor.

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the confession would nonetheless fall outside that period. The District Court excluded the twenty-seven minute period – 11:45 a.m. to 12:12 p.m. – necessary to transport Corley from the police station to the hospital. Because the hospital is less than a mile away from the F.B.I. office where Corley was taken, the agents would have traveled approximately the same distance over approximately the same time period.

I therefore believe that the safe-harbor period should be deemed expired. The remaining question, therefore, is whether Corley's confession was nonetheless admissible.

The majority adopts the government's argument that even if the confession was not forthcoming within the six-hour safe-harbor period provided in 18 U.S.C. § 3501(c), Corley's confession was admissible because it was voluntary.[25] It is, of course, a *sine qua non* that a confession must be voluntary before it can be admitted into evidence. *Crane v. Kentucky,* 476 U.S. 683, 687-88 (1986); *Jackson v. Denno,* 378 U.S. 368, 376-77 (1964). The converse does not follow.

I find irrefutable Corley's argument that if a confession only had to be voluntary to be admissible despite the delay in presentation to a magistrate judge, there would be no reason for 18 U.S.C. § 3501(c) because voluntariness is already covered in § 3501(a) and (b). Section 3501 (a) expressly states that a confession shall be admissible if it is voluntarily given. In its compelling statutory analysis, the court in *Superville* rejected the government's contention "that the sole test under 18 U.S.C. § 3501 for admission of any defendant's post-arrest statements is whether the defendant voluntarily confessed, and

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[25] The Assistant U.S. Attorney stated: "things may not be able to happen in six hours and that's why 3501 makes admissible confessions dependent on their voluntariness." Mar. 6, 2007 Oral Argument Tr. at 33.

delay in presentation is only one factor in this determination." 440 F. Supp. 2d at 681. The court noted that "[i]f every voluntary confession were admissible, as section 3501(a) read alone appears to require, there would be no need for section 3501(c) to provide that voluntary statements obtained in the first six hours following arrest or detention cannot be suppressed for pre-presentation delay. Subsection (c) would be entirely superfluous." *Id.* Other courts have recognized the same. *See United States v. Wilbon,* 911 F. Supp. 1420, 1426 (D.N.M. 1995) ("It is completely illogical to interpret subsection (c) as providing that voluntariness is the sole test" because the "time limitation and the accompanying proviso would be totally superfluous."); *accord United States v. Erving,* 388 F. Supp. 1011, 1016 (W.D. Wis. 1975). The majority recognizes that both the Courts of Appeals for the Second Circuit and the Ninth Circuit have agreed with this interpretation of the statutory language. I discuss those cases in detail hereafter.

The government did not provide a persuasive response to this court's question at oral argument: "If (a), which talks about voluntariness, is it, why don't you just stop there? Why did they do a (c) where they talk about a safe harbor for delay? Why is there a (c) at all?" Mar. 6, 2007 Oral Argument Tr. at 33. The government's only response was to refer us to a statement in our opinion in *Gov't of the V.I. v. Gereau,* 502 F.2d 914 (3d Cir. 1974), where we upheld the convictions of five defendants for murder, assault and robbery following a jury trial. A group of young men

had entered the clubhouse area of the Fountain Valley Golf Course in St. Croix armed with a variety of weapons, including a machine gun, robbed some of the guests and killed eight persons. It is undoubtedly difficult after more than 35 years to recreate the agitation and ferment the killings caused in the Virgin Islands, the Caribbean area generally, the United States and the tourist industry. This was only partially abated by the time of the trial and the appeal. All but one of the challenges raised by defendants to their convictions were rejected on appeal.[26]

The opinion of this court covered a wide range of issues. Most of the opinion addressed the validity of the searches and the failure to suppress the evidence seized, but it also covered the initial warrantless arrest of defendant Gereau, the sufficiency of the evidence, the motions to disqualify the trial court, a challenge to a juror for bias, the trial court's instructions to the jury regarding the voluntariness of the confessions and continuing deliberations, and the sentencing. *Gereau,* 502 F.2d at 921-22, 924-37. Slightly more than one paragraph of the lengthy opinion was focused on the admissibility of Gereau's statement given more than six hours after he was arrested and before he (and his co-defendants) were presented to a magistrate. *Id.* at 924.

---

[26] The court remanded for reconsideration of the trial court's denial of defendants' motion for a new trial, and directed the trial court to review the record of the hearing under a de novo standard. 502 F.2d at 936-37.

On appeal, this court held that defendants had not demonstrated clear error in the district court's factual finding that Gereau's confession was voluntary. *Id.* at 924. Instead, the focus of this portion of the opinion was the effect of the recent statute codified in 18 U.S.C. § 3501 on the admissibility of Gereau's confession in light of his claim of pre-arraignment delay. Much of the analysis in *Gereau* on that issue remains applicable and indisputable today, including the statements that "confessions are admissible if voluntarily given" and "in determining voluntariness the trial judge shall take into consideration all relevant circumstances including the time between arrest and arraignment (where, as here, the challenged statements were made within that time), whether defendant knew he was suspected of the crime concerned when he made his statement, whether defendant was informed that he was not required to make a statement and that he had a right to counsel." *Id.* at 923. As authority for these propositions, the *Gereau* court cited 18 U.S.C. § 3501(a) and (b).

The opinion then reviewed the requirements of the safe-harbor provision as set forth in 18 U.S.C. § 3501(c), which it summarized by stating that the "express declaration of § 3501(c) makes clear that a statement voluntarily given within six hours of arrest is not excludable because of delay in presentment after the statement was given." *Id.* at 924. The court declined to draw the negative implication that statements given before presentment but more than six

hours after arrest must be excluded unless due to transportation problems, and then stated, in the two sentences on which the government places its entire reliance, "Section 3501 makes admissibility of confessions dependent on their voluntariness. Delay in a defendant's presentment to a magistrate is only one factor relevant to voluntariness." *Id.*

If the majority is correct that "subsection (a) makes voluntariness the sole criterion for admissibility of a confession," Maj. Typescript Op. at 17, notwithstanding the length of the delay before the defendant is presented to the magistrate judge, not only would subsection (c) be superfluous, as many courts have noted, but the *Gereau* court's own preceding analysis would have been superfluous. In that discussion, only several paragraphs before the sentences at issue, the *Gereau* court stated "in determining voluntariness the trial judge shall take into consideration all relevant circumstances including the time [elapsing] between arrest and arraignment (where, as here, the challenged statements were made *within that time*). . . ." *Id.* at 923. A subsequent sentence clarifies that "within that time" refers to the safe-harbor period. *Id.* Because the court omitted from its definition of voluntariness consideration of whether the defendant's statement was made beyond the six-hour safe-harbor period, it would be inconsistent to interpret the opinion as holding that voluntariness alone supports admission of a confession made beyond the safe-harbor period. I decline to take

the one sentence relied on by the majority out of context.

In its statutory analysis, the majority completely overlooks the significance of the statutory "and" in subsection (c) which, focusing on the relevant language, states that a confession "shall not be inadmissible solely because of delay" in presentment if such confession is found "to have been made voluntarily . . . *and* if such confession was made or given by such person within six hours immediately following his arrest or other detention." 18 U.S.C. § 3501(c) (emphasis added). If voluntariness is all, I ask the majority, how does it explain the "and" which explicitly makes admissibility of a confession dependent on *both* voluntariness and presentment within six hours of defendant's arrest?

A plausible explanation for the inexplicable statement in *Gereau* was provided by the court in *Superville,* 40 F. Supp. 2d at 687, which noted that *Gereau* relied on opinions of two other Courts of Appeals both of which have since modified their interpretation of § 3501. The *Gereau* opinion cited the Second Circuit's opinion in *United States v. Marrero,* 450 F.2d 373 (2d Cir. 1971), for its focus on voluntariness. More than a decade after the Second Circuit's decision in *Marrero,* the court reexamined the issue in *United States v. Perez,* 733 F.2d 1026 (2d Cir. 1984). The *Perez* district court had determined that the delay in failing to present Perez, who was arrested at 3:25 p.m., to a magistrate judge before 2:30

p.m. the following day was unnecessary and unreasonable. *Id.* at 1027-28. The court noted that a magistrate judge was available for defendant's presentment until 6:25 p.m. on the day of the arrest and the government had failed to advance a compelling reason for not presenting defendant sooner than it did. *Id.* at 1035. On appeal, the Second Circuit rejected the argument that the voluntariness of the confession rendered it admissible. The court explained that "[w]here there has been a determination . . . that the delay in excess of six hours is unnecessary and not reasonable, nothing in our prior cases requires that the confession obtained was 'involuntary.'" *Id.* Rather, "section 3501 legislatively overruled the *McNabb-Mallory* rule only to the extent of (1) unreasonable pre-arraignment, pre-confession delays of less than six hours and (2) reasonable delays in excess of six hours." *Id.* In so holding, the court noted the independence of the safe-harbor provision from the remainder of the statute. *Id.* at 1030-31, 34.

Similarly, the *Gereau* opinion cited *United States v. Halbert*, 436 F.2d 1226, 1232-37 (9th Cir. 1970), to support its statement about voluntariness, but the Ninth Circuit, like the Second Circuit, revised the approach it took earlier. In *United States v Alvarez-Sanchez*, 975 F.2d 1396, 1400-01 (9th Cir. 1992), *rev'd on other grounds*, 511 U.S. 350 (1994), the court rejected a literal interpretation of § 3501(a). It stated, "in light of the provisions of § 3501(c), there must be circumstances in which delay in arraignment will require suppression of a confession regardless of the

voluntariness of the confession." *Id.* at 1401. These subsequent decisions from our sister circuits interpreting the cases on which we relied in *Gereau* are persuasive. I would therefore hold that the standard gleaned from the statute, Rule 5(a), and *McNabb* and *Mallory* is that even a voluntary statement may be excluded if the presentment delay is unreasonable or unnecessary.

The enactment of § 3501 does not displace Rule 5(a) and therefore the standard established in Rule 5(a) that an arrestee must be taken to a magistrate judge "without unnecessary delay" remains effective. The courts have generally equated "unnecessary" to "unreasonable," and I would do the same, noting that § 3501 also uses "reasonable" as a standard. The District Court found that the delay in presenting Corley to a magistrate judge was not "unnecessary" or "unreasonable." App. at 7. Nothing in the record supports such a finding.

Because I have already discussed, and rejected, the government's contention that the time for Corley's hospital visit should be deducted from the six hours provided by the statute as a safe harbor, I must next consider the separate question whether the time spent in connection with Corley's hospital visit renders the delay in presenting Corley to a magistrate judge "necessary" and "reasonable," and hence not subject to the interdiction of "unnecessary delay" within the meaning of Rule 5(a). I recognize that there may be situations when the arrestee is in dire medical circumstances, and must be seen promptly in

an emergency room. Certainly, in such a situation, delay occasioned by the need for immediate medical service would be a factor in considering whether the delay in presentation was "necessary." Corley's condition was not a medical emergency. He received stitches and medicine at the hospital and was sent on his way. There was no evidence that he was not fully alert and mobile.

Even if the delay in Corley's presentment was required because of his need to get medical treatment, the government has not explained why it did not bring him to the hospital earlier in the day or why it could not have presented Corley to a nearby magistrate judge immediately following his discharge from the hospital. The government does not suggest, nor could it, that there were no magistrate judges available. At the time of his arrest, the chambers of the magistrate judges and their courtrooms were in the same building as the offices of the FBI.

One of the reasons, and apparently the only reason, for the delay following Corley's hospital discharge was candidly given by one of the arresting officers. Trooper D'Angelo testified:

> Q [W]as Mr. Corley taken before a Federal Magistrate to be advised of the complaint against him for the assault of the Federal Officer . . . ?
>
> A Not . . . on the 17th of September, no.
>
> Q . . . Instead what happened was you stated your desire to Mr. Corley that you

> wanted to question him about his participation in this bank robbery, is that a fair statement?
>
> A Yes, we al – yes.

App. at 78. In response to the question whether he wanted Corley to confess to the robbery, D'Angelo answered: "Absolutely." App. at 92.

The desire to exact a confession is neither an accepted nor an acceptable excuse for the failure to take a defendant to a magistrate judge. Congress provided law enforcement authorities a window consisting of the six-hour safe-harbor period during which they may interrogate the defendant at will and attempt to persuade him or her to provide information about the alleged crime. But if they exceed the six-hour period, and fail to transport the defendant to a magistrate judge, they may not avoid the sanction of suppression of the confession on the ground that they were merely developing the required evidence. *See Ricks v. United States,* 334 F.2d 964, 968-69 (D.C. Cir. 1964) ("Nor can the delay of a preliminary hearing be justified on the ground that police activity for that period was required to investigate other unsolved crimes for which there was no probable cause to arrest the accused. . . . [N]either the Assistant [United States Attorney]'s advice nor the posited inaccessibility of a committing magistrate licensed the police to continue 'to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and

ultimately his guilt.'") (quoting *Mallory,* 354 U.S. at 454); *Ginoza v. United States,* 279 F.2d. 616, 621 (9th Cir. 1960) (confession inadmissible because delay designed to enable officers to obtain oral confession).

The Supreme Court was explicit on this issue in its decision in *Mallory,* where it stated that any necessary delay in presentation "must not be of a nature to give opportunity for the extraction of a confession." 354 U.S. at 455. The government has not suggested any legitimate basis for the delay; there was no transportation difficulty, no urgent medical need, and no unavailable magistrate judge. Because the safe-harbor period had expired, it follows that application of the *McNabb-Mallory* rule required suppression of Corley's confessions.

Corley's counsel argued that the confession was the only evidence presented against Corley. The government has not made its position on that fact explicit. If we were to remand, as I would do, I would leave that determination to the District Court on remand.

I recognize that law enforcement officials and government lawyers may believe that once a defendant is brought before a magistrate judge, the defendant will decline to make a statement (in the vernacular, "lawyer up"). The possibility of that result is no reason to forgo the important function served by the magistrate judge in advising the defendant of his or her rights. The *Miranda* rule requires the arresting officers to provide that information, but the legal

rules have been formulated to place more reliance on the statement of rights given by a neutral magistrate judge.

Suppression of the evidence of a confession may lead to the frustrating outcome, in some cases, of overturning a conviction. In *McNabb,* the Supreme Court ordered the suppression of the confessions of defendants who murdered a federal officer. In *Mallory,* the Supreme Court ordered the suppression of the confession of a defendant who was sentenced to death for rape. We can do no less in the case of a convicted bank robber. As the Court in *McNabb* stated, "[j]udicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." 318 U.S. at 340.

II.

For the reasons set forth above, I dissent from the majority's judgment affirming the decision of the District Court.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4716

UNITED STATES OF AMERICA

v.

JOHNNIE CORLEY,
Appellant

Appeal from the United States District Court for
the Eastern District of Pennsylvania
(D.C. Criminal Action No. 03-cr-00775)
District Judge: Honorable Berle M. Schiller

Argued March 6, 2007

Before: SLOVITER and AMBRO, *Circuit Judges*,
and THOMPSON,* *District Judge*

JUDGMENT

This cause came on to be heard on the record before the United States District Court for the Eastern

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* Honorable Anne E. Thompson, Senior United States District Judge for the District of New Jersey, sitting by designation.

District of Pennsylvania and was argued on March 6, 2007.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of conviction of the District Court entered September 29, 2004 be, and the same is, hereby affirmed. The judgment of sentence of the District Court, entered December 21, 2004, is hereby vacated with respect to the portion of the District Court's restitution order that sets the schedule of Corley's restitution payments and remanded to the District Court so that it may schedule the payments in accordance with the Mandatory Victims Restoration Act of 1996. The judgment of sentence of the District Court in all other respects is affirmed. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: August 31, 2007

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 04-4716

UNITED STATES OF AMERICA

v.

JOHNNIE CORLEY,
Appellant

(D.C. Criminal Action No. 03-cr-00775)

Present: SCIRICA, *Chief Judge,*
SLOVITER, McKEE, RENDELL, BARRY,
AMBRO, FUENTES, SMITH, FISHER,
CHAGARES, JORDAN, and HARDIMAN,
Circuit Judges and THOMPSON*, *District Judge*

SUR PETITION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellant having been submitted to the judges who participated

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* Honorable Anne E. Thompson, Senior United States District Judge for the District of New Jersey, sitting by designation.

in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED. Note that Judge Sloviter would have granted rehearing.

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: November 16, 2007
par/cc: D.L.McC., Esq. US Atty ED

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
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October 1, 2008

Mr. David L. McColgin
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Re: Johnnie Corley
v. United States
No. 07-10441

Dear Mr. McColgin:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

Sincerely,

/s/ William K. Suter
William K. Suter,
Clerk

PETITIONER'S BRIEF

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(3)

No. 07-10441

Supreme Court, U.S.
FILED
NOV 17 2008
OFFICE OF THE CLERK

In The Supreme Court of the United States

JOHNNIE CORLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTION PRESENTED

Whether 18 U.S.C. § 3501 – read together with Federal Rule of Criminal Procedure 5(a), *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957) – requires that a confession taken more than six hours after arrest and before presentment be inadmissible if there was unreasonable or unnecessary delay in presenting the defendant to the magistrate judge.

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I. Under 18 U.S.C. § 3501(c), Federal Rule of Criminal Procedure 5(a) and the *McNabb-Mallory* rule, confessions made more than six hours after a person's arrest, and before the person's presentment to a magistrate, are inadmissible if the presentment was unnecessarily or unreasonably delayed 19

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reprinted in the Joint Appendix (J.A.) at 175, and is reported at 500 F.3d 210 (3d Cir. 2007). The Third Circuit's denial of rehearing is reprinted at J.A. 243. The opinion of the district court denying the motion to suppress statements is reprinted at J.A. 93.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment and opinion of the Court of Appeals was entered on August 31, 2007. The Court of Appeals denied rehearing on November 16, 2007. On February 5, 2008, this Court granted petitioner's application for a 60-day extension of time for filing a petition for writ of certiorari, directing that the petition be filed on or before April 14, 2008. The petition was timely filed on that date and was granted on October 1, 2008. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 3501 (2000) provides in relevant part as follows:

> **(a)** In any criminal prosecution brought by the United States or by the District of

Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided,* That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.

Federal Rule of Criminal Procedure 5(a) provides in relevant part as follows:

> (a) In General.
>
> (1) Appearance Upon an Arrest.
>
> (A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.

STATEMENT OF THE CASE

This case involves the admissibility of two confessions to bank robbery – one oral and one written – that Johnnie Corley made during more than twenty-nine hours in custody before his presentment to a magistrate judge. The district court admitted the confessions despite Mr. Corley's argument that 18 U.S.C. § 3501(c), read in conjunction with Federal Rule of Criminal Procedure 5(a) and the *McNabb-Mallory* rule,[1] rendered them inadmissible because they were obtained more than six hours after his arrest and because his presentment was unnecessarily delayed. A divided panel of the Third Circuit affirmed, but also acknowledged that its interpretation of § 3501(c) was

[1] *See McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

contrary to precedent in other circuits and not the "better" of the conflicting readings of the statute. Mr. Corley seeks reversal and remand for a new trial in light of the plain meaning of the statute, which, together with the *McNabb-Mallory* rule, renders both confessions inadmissible.

1. Three men robbed the Norsco Federal Credit Union in Norristown, Pennsylvania, on June 16, 2003. J.A. 178. Members of a fugitive task force of the Federal Bureau of Investigation (FBI), including Special Agent Vito Roselli and State Trooper Vincent D'Angelo,[2] began investigating the robbery and received information that Mr. Corley may have been involved. They also learned that Mr. Corley was wanted on a local bench warrant from Philadelphia on an unrelated matter. J.A. 20, 38-39, 48.

On the morning of Wednesday, September 17, 2003, Agent Roselli, Trooper D'Angelo and other members of the FBI fugitive task force attempted to arrest Mr. Corley on the warrant in Sharon Hill, Pennsylvania, a suburb of Philadelphia. J.A. 13. As they surrounded his car with guns drawn, Mr. Corley jumped out, pushed past one of the officers and ran. Roselli and the officer gave chase. They followed him across a street, through several yards, across a creek, up an embankment and into a backyard. J.A. 14-16,

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[2] The FBI fugitive task force included state and local law enforcement officers deputized by the United States Marshal Service. J.A. 19.

26. During the chase, Agent Roselli fired one round from his gun, but did not hit Mr. Corley. He testified that the discharge was accidental. J.A. 25-26, 112-13. The agent caught Mr. Corley in the backyard and arrested him. The time of the arrest was 8:00 a.m. J.A. 28, 113.

2. Agent Roselli placed Mr. Corley under federal arrest for assault on a federal officer. J.A. 52. Agents put him in a local police car and had him taken to the Sharon Hill Police Department, where he was held until 11:45 a.m. J.A. 40, 93, 168. No explanation was given for holding Mr. Corley for nearly four hours in Sharon Hill, other than Trooper D'Angelo's testimony that during this time he went to interview neighbors living near where the arrest took place "to see if they had any information on Mr. Corley himself or any information that would . . . further our investigation." J.A. 40.

At approximately 11:45 a.m., FBI agents picked up Mr. Corley from the Sharon Hill police station and drove him to Philadelphia. J.A. 93, 168. Once there, the agents first took him to Thomas Jefferson University Hospital for treatment of a minor cut on his hand, received as he ran from the police that morning. J.A. 28, 114. He was admitted to the hospital at 12:12 p.m., received five sutures, and was discharged at 3:20 p.m. J.A. 49-50, 90-92.

From the hospital, the agents took Mr. Corley by car to the FBI office in Philadelphia, just a few blocks away, arriving at 3:30 p.m. J.A. 40, 168, 227-28 n.24.

Although the FBI offices are located in the same building as the federal magistrate judges' courtrooms and chambers, J.A. 237, and although a magistrate would have been available that day (Wednesday), J.A. 80, the FBI agents did not present Mr. Corley to a magistrate on the federal assault charge. Instead, Roselli and D'Angelo kept him at the FBI office for interrogation. By this point, seven and one-half hours had elapsed since Mr. Corley's arrest.

The only reason D'Angelo gave for not taking Mr. Corley before the magistrate that afternoon was his desire to question him about the bank robbery:

> Q. [A]t any time in the afternoon from 3:30 or when you first saw him at 3:30 was Mr. Corley taken before a Federal Magistrate to be advised of the complaint against him for the assault of the Federal Officer, did that happen?
>
> A. No. – not on the 17th of September, no.
>
> Q. . . . Instead what happened was you stated your desire to Mr. Corley that you wanted to question him about his participation in this bank robbery, is that a fair statement?
>
> A. Yes, we al – yes.

J.A. 53. D'Angelo further explained that his purpose in questioning Mr. Corley was to get a confession:

> Q. . . . [I]t would be fair to say that you wanted him to confess to the robbery, isn't that a fair statement?

A. Absolutely.

Q. And that was your purpose in questioning him, correct, to obtain a confession?

A. That was my chief purpose in talking to him.

J.A. 68-69.

Agent Roselli gave a similar explanation:

Q. . . . Now, you have Mr. Corley transported from the hospital to see you with regards to interrogation, correct?

A. Into an interview, yes, sir.

Q. And the purpose of that meeting and the purpose of your order to transport Mr. Corley is to question him about this robbery and to obtain a confession, is that true?

A. That is one of the purposes, yes, sir.

J.A. 138-39.

3. Roselli and D'Angelo began talking with Mr. Corley at 3:50 p.m. J.A. 61. They also gave him something to drink and some potato chips to eat. At first, they did not ask him any questions. Instead, they explained to him that he was not under arrest for the bank robbery, but that they had information he was involved in it. They said that if he cooperated with them he could get a lower sentence through a motion from the government. J.A. 41, 51, 55. This discussion regarding the value of cooperation continued for over one hour. J.A. 61.

At 5:07 p.m., Mr. Corley read and then signed a waiver-of-rights form, waiving his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). J.A. 61, 115-16. At 5:27 p.m. – nine hours and twenty-seven minutes after his arrest – he began giving a confession to the bank robbery. This oral confession concluded at 6:38 p.m., and was not written down. J.A. 62, 117-23. When asked to put his confession in writing, Mr. Corley said he was tired and asked to continue the following day. J.A. 46. He was taken to the Federal Detention Center in Philadelphia, where he spent Wednesday night. J.A. 64.

Federal magistrates conduct arraignments on indictments in Philadelphia each week on Thursdays at 10:00 a.m. J.A. 82. But rather than present Mr. Corley for his initial appearance before the magistrate conducting arraignments that Thursday morning, September 18, 2003, the FBI agents brought him back to the FBI office at 10:30 a.m. for further interrogation with agents Roselli and Stephen Heaney. *Id.* Roselli wrote out a confession in which Mr. Corley admitted to participating in the bank robbery, and Mr. Corley signed it at 10:45 a.m. J.A. 85, 172-74. Heaney acknowledged that the reason they did not bring Mr. Corley before a magistrate that morning was their desire to interrogate him:

> Q. . . . The reason that Mr. Corley was not brought before a magistrate on the morning of 9/18/03 and that he was brought to the FBI was the FBI's desire, when I say the FBI I'm talking about you and Agent Roselli's

> desire, to question Mr. Corley concerning the events of a bank robbery that he was being investigated for, isn't that true?
>
> A. Yes.

J.A. 83.

The agents finally brought Mr. Corley before a federal magistrate judge for his initial appearance at approximately 1:30 p.m. on September 18, 2003 – twenty-nine and a half hours after his arrest. J.A. 94.

4. Mr. Corley was charged by indictment with conspiracy to commit armed bank robbery (18 U.S.C. § 371, count one), armed bank robbery (18 U.S.C. § 2113(d), count two), and use and carrying of a firearm in furtherance of a crime of violence (18 U.S.C. § 924(c), count three). J.A. 179. He filed motions to suppress his oral and written confessions. J.A. 1-2. The district court denied the motions, finding after a hearing that both the oral and written statements were voluntary and therefore admissible under its interpretation of 18 U.S.C. § 3501. The district court also found that the oral statement was made within six hours of the arrest, excluding three hours and forty-five minutes during which Mr. Corley was "hospitalized" – a computation that included the time spent transporting Mr. Corley to Philadelphia, as well as the time at the hospital itself. J.A. 97.

A jury trial was held September 27-28, 2004. Mr. Corley's oral and written confessions constituted the only evidence introduced identifying him as one of the

robbers. J.A. 218 n.17 (Sloviter, J., dissenting). Mr. Corley was convicted of counts one and two (conspiracy and bank robbery), and was acquitted of count three (possession of a weapon during a crime of violence). On December 21, 2004, the district court sentenced Mr. Corley to 170 months' imprisonment, five years' supervised release, a fine of $1,000, restitution in the amount of $47,532.36, and a special assessment of $200. J.A. 4.[3]

5. A divided panel of the Court of Appeals for the Third Circuit affirmed the district court's ruling that both confessions were admissible because they were voluntary. J.A. 216-17. The majority ruled that it was bound by the prior ruling of the Third Circuit in *Gov't of Virgin Islands v. Gereau*, 502 F.2d 914 (3d Cir. 1974), which held that voluntary statements are admissible even if they were obtained outside the six-hour time period in 18 U.S.C. § 3501(c) as a result of unreasonable delay. J.A. 189-92. The majority expressed concern, however, about the district court's finding that the oral confession was made within six hours of arrest, observing that this finding was "contrary to the text of the statute – which provides that the only reasons for extending the six-hour

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[3] Mr. Corley was prosecuted separately for the federal assault charge arising from his arrest on September 17, 2003. He pleaded guilty, and on February 26, 2004, he was sentenced to twenty-six months in prison, three years of supervised release, and a special assessment of $100. *United States v. Corley*, No. 03-cr-664 (E.D. Pa.). The assault and bank robbery sentences are concurrent.

period are those relating to transportation or to the availability of a magistrate judge or other officer." J.A. 197 n.7. But the majority concluded that it did not need to further address the district court finding, given its ruling that both confessions were voluntary. *Id.* The majority thus implicitly acknowledged that both confessions were taken outside the six-hour period.

The majority reasoned that *Gereau* provides a "plausible" reading of the six-hour rule of 18 U.S.C. § 3501(c). J.A. 189. It interpreted § 3501 as making voluntariness the sole test for admissibility in cases of delayed presentment. Under the majority's reading, the statute "replaces the 'unnecessary delay' standard [in Fed. R. Crim. P. 5(a)] with the voluntariness test in subsections (a) and (b) of the statute, in which the length and necessity of the presentment delay are factors in the analysis but not necessarily dispositive." J.A. 190. The majority read subsection (c) as instructing courts "that they may not find a confession involuntary 'solely' because of the length of presentment delay where the confession is *otherwise* voluntary and where the delay is less than six hours (or longer than six hours but explained by transportation difficulties)." J.A. 191.

The *Corley* majority acknowledged a circuit split on this issue, however: the Second, Ninth and D.C. Circuits have concluded that this interpretation not only renders the six-hour rule in § 3501(c) "superfluous," but is contrary to the statute's legislative

history. J.A. 194-95. The majority then noted the strength of these arguments:

> Our dissenting colleague cogently argues that the Second, Ninth and D.C. Circuits have the better of the argument regarding the proper interpretation of § 3501. Were we writing on a clean slate, we might agree. As explained above, however, our Court has already resolved these issues in *Gereau*.

J.A. 195. Further undermining *Gereau*, the *Corley* majority noted that *Gereau* itself was based on Second and Ninth Circuit precedent that "those Circuits have since repudiated." J.A. 196.

6. Judge Sloviter, in dissent, explained that § 3501 must be read in the context of this Court's decisions in *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957), as well as Rule 5(a) of the Federal Rules of Criminal Procedure, which codifies the requirement of prompt presentment. Together, these establish what is known as the "*McNabb-Mallory* rule," under which a confession is inadmissible if obtained in violation of a defendant's right upon arrest to be taken before a judicial officer without unnecessary delay. J.A. 219-23.

Against this backdrop, Judge Sloviter reasoned, § 3501(c) must be read as having "'only excised the first six hours after arrest or detention from the scope of the *McNabb-Mallory* exclusionary rule.'" J.A. 226 (quoting *United States v. Superville*, 40 F. Supp. 2d

672, 683 (D.V.I. 1999)). Like the majority, Judge Sloviter found that the two confessions in this case were taken outside the six-hour period allowed under § 3501(c). Judge Sloviter thus concluded that the *McNabb-Mallory* rule should be applied and that the presentment delay was unreasonable because it was for the purpose of interrogation. For this reason, she concluded, the *McNabb-Mallory* rule requires suppression of Mr. Corley's statements. J.A. 239.

SUMMARY OF ARGUMENT

FBI agents purposefully and unnecessarily delayed Mr. Corley's presentment to a magistrate judge following his arrest in order to obtain his oral and written confessions. The admissibility of these two confessions turns on the meaning of 18 U.S.C. § 3501 in light of the right to prompt presentment. The proper interpretation of the statute is that confessions made outside the six-hour time limitation set forth in § 3501(c) are inadmissible under the *McNabb-Mallory* rule if the defendant's presentment to a magistrate was unnecessarily delayed.

1. Rule 5(a) of the Federal Rules of Criminal Procedure codifies the common-law right to prompt presentment before a neutral judicial officer following arrest. The rule requires presentment "without unnecessary delay." In *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957), the Court established a rule of

evidence to enforce this right of prompt presentment and to protect against the use of delayed presentment as a means of extracting a confession. Under the *McNabb-Mallory* rule, when law enforcement officers obtain a confession from a defendant during a period of unnecessary delay between arrest and presentment, the confession is inadmissible.

In 1968, Congress addressed the *McNabb-Mallory* rule by enacting 18 U.S.C. § 3501(c). The statute provides that voluntary confessions made within six hours of arrest are not inadmissible solely because of delay. The central question presented in this case is whether § 3501 abrogates the *McNabb-Mallory* rule entirely, or merely exempts from the rule confessions made within the first six hours of arrest. The text of § 3501(c), read in light of *McNabb* and *Mallory*, compels the conclusion that Congress intended only to exempt the six hours following arrest, and to codify the *McNabb-Mallory* rule for confessions obtained outside that time period. Principles of statutory construction confirm this interpretation, as does the legislative history of § 3501.

Section 3501(c), by the plain meaning of its text, sets a six-hour "time limitation" on the inadmissibility of voluntary confessions due solely to delay. Confessions are not "inadmissible solely because of delay" in presentment if the confession was "made voluntarily" *and* "within six hours" following arrest, unless delay beyond six hours was reasonable considering transportation and distance to the magistrate. 18 U.S.C. § 3501(c). By rendering voluntary confessions

"not inadmissible solely because of delay" only if made within six hours of arrest, § 3501(c) eliminates the *McNabb-Mallory* rule for voluntary confessions made within six hours, but leaves it intact for voluntary confessions made outside that time period. The statute's text shows Congress intended that confessions made outside this period, even if voluntary, be inadmissible under the *McNabb-Mallory* rule if the presentment delay was unnecessary.

This interpretation of § 3501(c)'s text is supported by well-established principles of statutory construction. Although subsection (a) of the statute states broadly that voluntary confessions are admissible, this general statement cannot be read to abrogate completely the *McNabb-Mallory* rule without making subsection (c) superfluous. Such a result would violate the rule of construction that effect should be given to every clause of a statute where possible. Under this reading, voluntary statements – regardless of whether made outside the six-hour time limitation and regardless of presentment delay – would be admissible. The six-hour time limitation would therefore limit nothing at all, and the entire subsection would be without effect.

To give effect to subsection (c), § 3501 must be interpreted as leaving intact the *McNabb-Mallory* rule for voluntary confessions made outside the six-hour period. To the extent there is any tension between the general statement in subsection (a) that voluntary confessions are admissible and the specific provision in subsection (c), the well-established

principle that a specific provision controls over a general one should apply. Subsection (c) thus must be interpreted as exempting only the first six hours after arrest from the *McNabb-Mallory* rule.

Subsection (c) cannot be interpreted, as suggested by the Third Circuit, as merely barring the court from finding a confession made within the six-hour period "involuntary" based on delay alone if the confession was "otherwise" voluntary. This interpretation requires rewriting the statute by substituting and adding words to the text. In addition, such a construction would be constitutionally doubtful because the courts, not Congress, must determine which confessions are voluntary in accordance with the Due Process Clause and the Fifth Amendment. Congress cannot constitutionally narrow the factual grounds for determining voluntariness. Subsection (c), therefore, should be construed in accordance with its text and structure, which establish that delay – and not merely involuntariness – is a criterion for the inadmissibility of confessions.

The legislative history of § 3501 confirms that Congress intended not to abrogate the *McNabb-Mallory* rule entirely, but instead to limit its application to confessions taken more than six hours after arrest. Although the original version of subsection (c) would have abrogated the rule completely, that is not the version that was enacted. Instead, the Senate reached a compromise and passed an amended version of § 3501(c) that merely carved out from the *McNabb-Mallory* rule confessions taken within six

hours following arrest. This compromise was based on a similar statute applicable to the District of Columbia, which the same Congress had enacted five months earlier. In addition, during debate, the sponsor and floor manager of § 3501 made clear that subsection (c) alone was intended to address the *McNabb-Mallory* rule and that subsection (a) was never meant to abrogate the rule.

Interpreting § 3501 as leaving the *McNabb-Mallory* rule intact for confessions made outside the six-hour time period assists in the effective administration of justice by providing a clear rule to law enforcement and the courts. Under this interpretation, § 3501(c) establishes a bright-line rule that federal law enforcement agents and the courts can readily apply when determining the admissibility of confessions in cases of delayed presentment. As this Court has observed, such a rule is much easier to implement than the totality-of-the-circumstances test used for determining voluntariness. *See Dickerson v. United States*, 530 U.S. 428, 444 (2000). The rule is also a necessary adjunct to *Miranda v. Arizona*, 384 U.S. 436 (1966), because it ensures that presentment delay will not be used as a means of pressuring arrestees to waive their Fifth Amendment rights.

2. Application of § 3501(c) and the *McNabb-Mallory* rule to the facts of this case is straightforward. As the majority and the dissent below agreed and the government conceded, both of Mr. Corley's confessions were taken more than six hours after his arrest. The confessions were therefore outside the

time limitation of § 3501(c), and the *McNabb-Mallory* rule applies. Since the FBI agents admitted that they delayed Mr. Corley's presentment to the magistrate for the purpose of obtaining his confessions, the delay (totaling over twenty-nine hours) was patently unreasonable and unnecessary under the *McNabb-Mallory* rule and Rule 5(a). Such purposeful exploitation of delay requires that the confessions be inadmissible.

ARGUMENT

I. UNDER 18 U.S.C. § 3501(c), FEDERAL RULE OF CRIMINAL PROCEDURE 5(a) AND THE *McNABB-MALLORY* RULE, CONFESSIONS MADE MORE THAN SIX HOURS AFTER A PERSON'S ARREST, AND BEFORE THE PERSON'S PRESENTMENT TO A MAGISTRATE, ARE INADMISSIBLE IF THE PRESENTMENT WAS UNNECESSARILY OR UNREASONABLY DELAYED.

Section 3501(c), read together with Federal Rule of Criminal Procedure 5(a) and the *McNabb-Mallory* rule, requires the exclusion of voluntary confessions taken more than six hours after arrest if the defendant's presentment to a magistrate judge was unnecessarily delayed. This interpretation is compelled by the statute's text, accepted principles of statutory construction, and the legislative history of § 3501. It also furthers the effective and efficient administration of justice.

A. The *McNabb-Mallory* rule protects the right of prompt presentment codified in Rule 5(a) by rendering inadmissible those confessions made during a period of unnecessary presentment delay.

The right of prompt presentment, which originated at common law, ultimately was codified in Rule 5(a) of the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 5(a)(1)(A). Recognizing that law enforcement officers at times ignored the right of prompt presentment in order to obtain confessions, this Court decided a series of cases, whose holdings came to be known as the *McNabb-Mallory* rule. *See McNabb v. United States*, 318 U.S. 332 (1943); *Upshaw v. United States*, 335 U.S. 410 (1948); *Mallory v. United States*, 354 U.S. 449 (1957). The *McNabb-Mallory* rule protects the right of prompt presentment, and guards against police exploitation of presentment delay, by rendering inadmissible confessions taken during a period of unnecessary delay.

The right of prompt presentment has its origins in the common-law protections against unlawful arrest. *See Gerstein v. Pugh*, 420 U.S. 103, 114-16 (1975) ("At common law it was customary, if not obligatory, for an arrested person to be brought before a justice of the peace shortly after arrest."). One of the most important of those protections "was that a person arresting a suspect without a warrant must deliver the arrestee to a magistrate 'as soon as he reasonably can.'" *County of Riverside v. McLaughlin*,

500 U.S. 44, 61 (1991) (Scalia, J., dissenting) (quoting 2 M. Hale, Pleas of the Crown 95 n.13 (1st Am. ed. 1847)). It was clear at common law, moreover, "that the only element bearing upon the reasonableness of delay was not such circumstances as the pressing need to conduct further investigation, but the arresting officer's ability, once the prisoner had been secured, to reach a magistrate who could issue the needed warrant for further detention." *Id.*

The Court first addressed the right to prompt presentment in *McNabb*.[4] There, federal officers held the defendants in custody on murder charges and interrogated them over the course of several days before bringing them before a judicial officer. 318 U.S. at 334-38. The government argued that the resulting confessions were admissible because they were voluntary, but the Court declined to reach this issue.

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[4] Some cases discussing presentment delay refer to the initial appearance before a magistrate as "arraignment," and discuss delay as "pre-arraignment" delay. *See, e.g., United States v. Perez*, 733 F.2d 1026, 1027 & n.1 (2d Cir. 1984). *See also* J.A. 223 n.21 (Sloviter, J., dissenting) (noting confusion over terminology). To avoid confusion with the term "arraignment" as used in Federal Rule of Criminal Procedure 10, at which the defendant enters a plea to an indictment or information, the term "presentment" is used throughout this brief to refer to the defendant's initial appearance before a magistrate under Rule 5 following arrest, at which the magistrate informs the defendant of the complaint and affidavit in support of the arrest, the right to counsel, the circumstances under which the defendant can be released pre-trial, and the right to remain silent. Fed. R. Crim. P. 5(d).

Instead, the Court took note of federal legislation requiring prompt presentment and exercised its supervisory authority over the federal courts to rule that the violation of the defendant's right to prompt presentment meant that the confessions "must be excluded." *Id.* at 339-42.

Shortly after *McNabb*, the right of prompt presentment became embedded in the Federal Rules of Criminal Procedure with the adoption of Rule 5(a), requiring that federal officers take an arrested person before a judicial officer "without unnecessary delay." Fed. R. Crim. P. 5(a) (adopted 1946). As the Court later described it, this rule is a "compendious restatement, without substantive change, of several prior specific federal statutory provisions." *Mallory*, 354 U.S. at 452. The current version of Rule 5(a) is substantially the same as the original, and requires in pertinent part that "[a] person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge. . . . " Fed. R. Crim. P. 5(a)(1)(A).

Soon after the adoption of Rule 5(a), the Court reaffirmed *McNabb* in *Upshaw*, making clear that the *McNabb* rule applies even in the absence of coercion. As the Court explained, under the "*McNabb* rule . . . a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical, or psychological. . . . '" 335 U.S. at 413 (quoting *United States v. Mitchell*, 322 U.S. 65, 68 (1944)).

The Court reiterated the rule in *Mallory*, holding that delay for the purpose of interrogation is "unnecessary delay" under Rule 5(a). 354 U.S. at 455. In *Mallory*, police arrested the defendant for rape in the early afternoon and held him at police headquarters "within the vicinity of numerous committing magistrates." *Id.* But instead of presenting him to a magistrate, they held him for questioning and obtained a confession approximately seven hours later. Police did not present the defendant to a magistrate until the next morning. *Id.* at 450-51. The Court ruled that the delay violated Rule 5(a) and rendered the confession inadmissible. *Id.* at 455.

The Court in *Mallory* emphasized that although the arrested person may be "booked" before presentment, "he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt." *Id.* at 454. The prohibition of "unnecessary delay" means that any delay in presentment "must not be of a nature to give opportunity for the extraction of a confession," regardless of voluntariness. *Id.* at 455.

B. 18 U.S.C. § 3501(c) codifies a limited version of the *McNabb-Mallory* rule, applicable to confessions taken more than six hours after arrest.

Congress addressed the admissibility of confessions in 18 U.S.C. § 3501, enacted as part of Title II of

the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 701-02, 82 Stat. 210 (1968). Subsection (c) of § 3501 addresses the circumstances under which confessions may be inadmissible solely due to presentment delay. The text of the statute makes clear that Congress established a six-hour "time limitation" in order to carve out from the *McNabb-Mallory* rule confessions made within six hours of arrest, and left the *McNabb-Mallory* rule in effect for confessions made outside that six-hour period. This interpretation is confirmed by well-established principles of statutory construction and the legislative history of § 3501.

1. The text of 18 U.S.C. § 3501 establishes that subsection (c) limits but does not entirely abrogate the *McNabb-Mallory* rule.

Section 3501 begins in subsection (a) by setting out the general rule that a confession "shall be admissible if voluntarily given," and requiring the trial judge to hold a pre-trial hearing to determine voluntariness. 18 U.S.C. § 3501(a). Subsection (b) sets out a non-exclusive list of factors to be considered in determining voluntariness under the totality of the circumstances. One of these factors is presentment delay – "the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment." 18 U.S.C. § 3501(b)(1).

By making voluntariness the "touchstone of admissibility" and omitting any warning requirement, Congress intended subsections (a) and (b) to overrule legislatively the requirement of *Miranda v. Arizona*, 384 U.S. 436, 467-71 (1966), that defendants held in custody be warned of their rights before making a statement. *Dickerson v. United States*, 530 U.S. 428, 436 (2000). In *Dickerson*, the Court rejected the attempt and upheld *Miranda* as announcing a constitutional rule. *Id.* at 444.

Subsection (c) addresses the *McNabb-Mallory* rule by setting a "time limitation" on the inadmissibility of voluntary confessions due solely to presentment delay. It reads in pertinent part as follows:

> [A] confession made or given by a person . . . , while such person was under arrest or other detention . . . **shall not be inadmissible solely because of delay** in bringing such person before a magistrate . . . **if such confession is** found by the trial judge to have been **made voluntarily** and if the weight to be given the confession is left to the jury **and if such confession was made . . . within six hours immediately following his arrest or other detention:** *Provided*, That the **time limitation** contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be **reasonable considering the means of transportation and the**

> **distance to be traveled to the nearest available magistrate or other officer.**

18 U.S.C. § 3501(c) (bold emphasis added).

As this Court has stated, in construing what Congress has enacted, "[w]e begin, as always, with the language of the statute." *Duncan v. Walker*, 533 U.S. 167, 172 (2001). The language of subsection (c) establishes that voluntariness is not the only criterion for admissibility in cases of presentment delay. Instead, subsection (c) provides that a confession "shall not be inadmissible solely because of delay" if three conditions are met: (1) if the confession was "made voluntarily"; (2) if its weight is left to the jury; "*and* [3] if such confession was made or given . . . within six hours" of arrest (unless a longer period is reasonable considering transportation and distance to the magistrate). 18 U.S.C. § 3501(c); *see also United States v. Perez*, 733 F.2d 1026, 1031 (2d Cir. 1984). The word "and" makes clear that the six-hour time limitation is a requirement *in addition* to voluntariness. *See* J.A. 234 (Sloviter, J., dissenting).

The plain meaning of this statutory text does not abrogate the *McNabb-Mallory* rule, but instead codifies a limited version of it. Congress is presumed to be familiar with this Court's precedents, *see Cannon v. University of Chicago*, 441 U.S. 677, 699 (1979), and the phrase "inadmissible solely because of delay" is a clear reference to the rule established in *McNabb* and *Mallory*. Subsection (c) thus states that the *McNabb-Mallory* rule is inapplicable only if three

conditions are met, including the requirement that the confession be taken within six hours of arrest. The statutory language demonstrates Congress's intent to leave the *McNabb-Mallory* rule intact for confessions made outside that time period.[5]

Accordingly, as four circuits have held, § 3501(c) effectively codifies the *McNabb-Mallory* rule, with an exception for statements made within six hours of arrest. *See United States v. Mansoori*, 304 F.3d 635, 660 (7th Cir. 2002); *United States v. Alvarez-Sanchez*, 975 F.2d 1396, 1402-03 (9th Cir. 1991), *rev'd on other grounds*, 511 U.S. 350 (1994); *Perez*, 733 F.2d at 1031 (2d Cir. 1984); *United States v. Robinson*, 439 F.2d 553, 563-64 (D.C. Cir. 1970). *See also* J.A. 226 (Sloviter, J., dissenting). *Cf. United States v. Beltran*, 761 F.2d 1, 8 (1st Cir. 1985) (holding delay in excess of six hours unreasonable, but suppression of confessions not automatically required because "no purposeful postponement," and delay not used for "proscribed purposes envisioned" by Court in *McNabb* and *Mallory*).

The statute, read together with Rule 5(a) and the *McNabb-Mallory* rule, requires a two-step analysis for determining whether a voluntary confession is inadmissible solely on grounds of presentment delay:

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[5] As discussed below, this interpretation is confirmed by the legislative history of § 3501, which makes abundantly clear that subsection (c) was intended to modify the *McNabb-Mallory* rule, not eliminate it entirely. *See infra* pp. 38-56.

first, the court must determine whether the confession was made within six hours of arrest (unless a longer period of time was reasonable considering transportation and distance to the magistrate); and second, if the confession fell outside the six-hour period, the court must determine whether the delay from arrest to presentment was unreasonable or unnecessary under the *McNabb-Mallory* rule and Rule 5(a). If so, the confession is inadmissible.

2. Principles of statutory construction confirm that § 3501 leaves the *McNabb-Mallory* rule intact outside the six-hour time limitation.

Well-established principles of statutory construction confirm the plain meaning of § 3501(c)'s text. These principles require that (a) statutes be interpreted so as not to render any portion superfluous, (b) specific provisions prevail over any conflicting general provisions, (c) statutes not be rewritten to reach a particular interpretation, (d) constitutionally doubtful interpretations be avoided, and (e) statutes be interpreted in accordance with their structure.

The conclusion of the Third Circuit below – that voluntariness is the sole criterion for admissibility under § 3501, and that presentment delay can be considered only as a factor that may affect whether

the confession was voluntary[6] – violates each of these principles of statutory construction.

(a) Section 3501 should be interpreted so as not to render subsection (c) superfluous.

The interpretation of § 3501 making voluntariness the sole criterion for admissibility renders subsection (c) entirely superfluous. As such, it violates the rule of construction that courts should give effect to every provision in a statute when possible. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) ("'A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . . '") (quoting 2A Norman J. Singer, Sutherland Statutes and Statutory Construction § 46:06 (rev. 6th ed. 2000)); *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115-16 (1879) ("We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word.").

If voluntariness were the sole criterion for admissibility, it would make no difference whether a confession was given before or after the six-hour time

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[6] J.A. 189-92 (majority opinion). *See also United States v. Glover*, 104 F.3d 1570, 1583 (10th Cir. 1997); *United States v. Christopher*, 956 F.2d 536, 538-39 (6th Cir. 1991); *Gov't of Virgin Islands v. Gereau*, 502 F.2d 914, 924 (3d Cir. 1974).

period expired. Either way, the confession would be admissible so long as it was voluntary. The six-hour "time limitation" in § 3501(c) would not be a "limitation" on anything at all, and the entire subsection would be without effect. *See* J.A. 229-30 (Sloviter, J., dissenting); *Perez*, 733 F.3d at 1031; *Alvarez-Sanchez*, 975 F.2d at 1400; *United States v. Superville*, 40 F. Supp. 2d 672, 681 (D.V.I. 1999). Subsection (b), which already requires consideration of presentment delay in determining involuntariness (as opposed to inadmissibility under the *McNabb-Mallory* rule), would subsume subsection (c). 18 U.S.C. § 3501(b)(1). To give effect to subsection (c), voluntariness cannot be the sole criterion for admissibility. For confessions made outside the six-hour time period, unnecessary presentment delay must, pursuant to the *McNabb-Mallory* rule, be a basis for finding the confession inadmissible, even if the confession is voluntary. Without the *McNabb-Mallory* rule, subsection (c) becomes entirely superfluous.

(b) Subsection (c), as a specific provision, should prevail over the general provision of subsection (a), to the extent that they conflict.

Giving effect to subsection (c) as a partial codification of the *McNabb-Mallory* rule may appear to create tension with subsection (a)'s general statement that all voluntary confessions are admissible. But even if the provisions were actually in conflict

(which the legislative history of § 3501 demonstrates not to be the case, *see infra* pp. 52-56), subsection (c) would prevail on the specific issue of inadmissibility due solely to presentment delay.

Where there is "inescapable conflict between general and specific terms or provisions of a statute, the specific will prevail." 2A Norman J. Singer, Sutherland Statutes and Statutory Construction § 46:5 (rev. 7th ed. 2008); *see Dep't of Rev. of Oregon v. ACF Industries,* 510 U.S. 332, 340 (1994) (holding that general provision in statute barring tax discrimination against rail carriers should not be interpreted to subvert specific provision in same statute allowing for exemption from taxation for certain specified types of property); *Busic v. United States*, 446 U.S. 398, 406 (1980) ("[A] more specific statute will be given precedence over a more general one. . . . "); *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973) (holding that general terms of civil rights statute, 42 U.S.C. § 1983, which, interpreted literally, would provide relief to prisoners, cannot override specific provision in 28 U.S.C. § 2254, making habeas corpus sole remedy for prisoners seeking relief).

Accordingly, the specific provision in subsection (c), codifying the *McNabb-Mallory* rule for voluntary confessions made outside the six-hour time limitation, must control over the general statement in subsection (a) that voluntary confessions are admissible. No other interpretation gives effect to subsection (c).

(c) The Third Circuit's rewriting of subsection (c) to support its interpretation should be rejected.

The majority below attempted to avoid rendering subsection (c) superfluous by, in effect, rewriting the subsection. This interpretation must be rejected because, as the Court recently stated, "[w]e are not at liberty to rewrite [a] statute to reflect a meaning we deem more desirable. Instead, we must give effect to the text Congress enacted." *Ali v. Fed. Bureau of Prisons*, ___ U.S. ___, 128 S. Ct. 831, 841 (2008) (footnote omitted). The key sentence in the Third Circuit majority opinion is as follows:

> In this vein, subsection (c) instructs courts that they may not find a confession involuntary 'solely' because of the length of presentment delay where the confession is *otherwise* voluntary and where the delay is less than six hours (or longer than six hours but explained by transportation difficulties).

J.A. 191 (italics in original). But the statute itself reads quite differently:

> [A] confession . . . shall not be *inadmissible* solely because of [presentment] delay . . . if such confession is found by the trial judge to have been *made voluntarily* . . . and if such confession was given . . . within six hours [of arrest].

18 U.S.C. § 3501(c) (emphasis added). The court's interpretation effectively rewrites the statute, substituting the word "involuntary" for "inadmissible," and

adding the word "otherwise" before "voluntar[il]y." Both of these judicial amendments must be rejected because they alter the statute's text in a way that is contrary to its plain meaning.

Substitution of "involuntary" for "inadmissible." As the Second Circuit has cogently explained, Congress "specifically used the term 'inadmissible solely because of delay.'" *Perez*, 733 F.2d at 1031. If Congress had intended admissibility to turn only on voluntariness, subsection (c) would have "contained language to the effect that 'a confession shall not be deemed *involuntary* solely because of delay.'" *Id.* (italics in original). By coupling "inadmissible" with "delay" in subsection (c), Congress clearly intended "that delay may serve as the basis for a separate, independent exclusionary remedy." *Id.* Congress used the term "inadmissible" precisely because it means something different than "involuntary." "Inadmissible" is broader than "involuntary," and equating the two ignores Congress's choice of words.[7] As the legislative history reveals, *see infra* pp. 52-56, the use of

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[7] This difference is evident in related case law and rules of evidence. Confessions that are voluntary may nonetheless be inadmissible, for example, because they were the fruit of an unlawful arrest, *see Brown v. Illinois*, 422 U.S. 590, 602 (1975), *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963), or because they were obtained in violation of the defendant's Sixth Amendment right to counsel, *see Smith v. Illinois*, 469 U.S. 91, 94-95 (1984), or because they lack sufficient relevance to the offense charged under Federal Rules of Evidence 401 and 402, or because their unfair prejudicial effect outweighs their probative value under Federal Rule of Evidence 403.

"inadmissible" was deliberate, distinguishing the purpose of subsection (c) (to address the *McNabb-Mallory* rule) from the purpose of subsections (a) and (b) (to overrule *Miranda*). The Third Circuit majority's substitution of "involuntary" for "inadmissible" must therefore be rejected as contrary to the text and plain meaning of the statute.

Addition of "otherwise." The addition of the word "otherwise" before "voluntarily" must also be rejected. The Third Circuit majority inserted this word in an effort to save subsection (c) from being entirely superfluous under its interpretation of § 3501. The insertion of "otherwise" allowed the majority to interpret the subsection as "merely instruct[ing] trial courts that the inherently coercive effect of a lengthy delay in presentment is not sufficient, *standing alone*, to render a confession involuntary" where the confession is "*otherwise* voluntary" and the delay is either less than six hours or reasonable in light of transportation and distance to be traveled. J.A. 191-92. Under this rewriting, subsection (c) merely narrows somewhat the court's ability to consider delay in its determination of voluntariness under subsections (a) and (b). But the very fact that the majority must add the word "otherwise" in order to support its interpretation is telling. "Otherwise" is not in the statute, and Congress must be presumed to have meant what it said. Indeed, the legislative history shows that Congress's choice of the word "voluntary," unmodified, was deliberate and incompatible with the majority's rewriting of the text. *See infra* pp. 55-56.

(d) The Third Circuit's interpretation of subsection (c) should be rejected as constitutionally doubtful.

The majority's interpretation must also be rejected as constitutionally doubtful. The Court has long adhered to the principle that "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'" *Jones v. United States*, 526 U.S. 227, 239 (1999) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)). In explaining this principle of statutory construction, the Court has stated, "It is 'out of respect for Congress, which we assume legislates in the light of constitutional limitations,' *Rust v. Sullivan*, 500 U.S. 173, 191 (1991), that we adhere to this principle, which 'has for so long been applied by this Court that it is beyond debate.'" *Jones*, 526 U.S. at 240 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

The majority's interpretation of § 3501(c) is constitutionally doubtful because it narrows the grounds on which a court may find a confession involuntary. The courts, not Congress, must determine which confessions are involuntary, and therefore inadmissible, under the Due Process Clause and the Fifth Amendment privilege against self-incrimination. *See Jackson v. Denno*, 378 U.S. 368, 376-77 (1964) (barring the

admission of confessions found by trial judge to be involuntary); *Miranda*, 384 U.S. at 460-61 (holding Fifth Amendment privilege against self-incrimination fully applicable during custodial interrogation). As the Court stated in *Miranda*, issues of "constitutional dimensions . . . *must be determined by the courts*," and "[t]he admissibility of a statement in the face of a claim that it was obtained in violation of the defendant's constitutional rights is an issue the resolution of which has long since been undertaken by this Court." *Id.* at 490 (emphasis added). *See also Dickerson*, 530 U.S. at 444 (holding that Congress may not legislatively overrule *Miranda*'s warnings-based approach to determining admissibility of confessions).

Congress, therefore, can neither direct the courts to admit confessions the courts find to be involuntary, nor accomplish the same thing by narrowing the factual grounds for determining involuntariness. "Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." *Miranda*, 384 U.S. at 491. Since the majority's interpretation of § 3501(c) would restrict the grounds on which courts may find confessions involuntary, it is at least constitutionally doubtful and must be rejected.

(e) Section 3501(c) should be interpreted in accordance with its structure, which makes clear that it addresses delay as an independent criterion for the inadmissibility of confessions.

The structure of subsection (c) confirms the plain meaning of § 3501's text. *See Ali*, 128 S. Ct. at 840 (interpretation of statute should be consistent with its text and structure). While subsection (b) addresses presentment delay as a factor in determining voluntariness, the role that delay in presentment plays in subsection (c) is different. In subsection (c), presentment delay is the criterion for the inadmissibility of *voluntary* confessions taken outside the six-hour time limitation. This difference is demonstrated by the fact that subsection (c) is structured with a proviso that lists reasons that may justify delay past the six-hour time period, and these reasons – mode of transportation and distance to the nearest magistrate – have no bearing on voluntariness. As the Second Circuit explained, "were voluntariness the sole consideration, the necessity of the delay would be entirely irrelevant." *Perez*, 733 F.2d at 1034. The structure and text of subsection (c) thus make clear that its purpose is not to narrow the test for voluntariness, but to set a time limit on the admissibility of voluntary confessions in cases of delayed presentment.

3. The legislative history confirms that § 3501 partially codifies the *McNabb-Mallory* rule.

Because the meaning of § 3501 is clear both from its text and under accepted principles of statutory construction, the Court need not rely on the statute's legislative history. Consultation of the legislative history remains appropriate to confirm the statute's meaning, however, and should be determinative if the Court deems § 3501 ambiguous. *See, e.g.*, *Negonsott v. Samuels*, 507 U.S. 99, 106-09 (1993) (consulting legislative history to confirm interpretation of text deemed unambiguous through statutory construction); *United States v. R.L.C.*, 503 U.S. 291, 298-305 (1992) (placing determinative weight on legislative history, including textual evolution of bill, when interpreting ambiguous text).[8]

The legislative history of Title II of the Omnibus Crime Control and Safe Streets Act of 1968 strongly confirms that, in enacting § 3501, Congress intended only to modify the *McNabb-Mallory* rule by limiting its application to confessions taken more than six

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[8] Perhaps the best practice is to consider legislative history whenever it is available, and to give it the weight it deserves based on the amount of light it sheds on the statute's meaning. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 65 (2004) (Stevens, J., concurring) ("It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress' true intent when interpreting [statutes].").

hours after arrest.[9] First, the textual evolution of § 3501(c) bears that out. As originally proposed, subsection (c) sought to abrogate the *McNabb-Mallory* rule entirely. It was amended, however, to partially codify and partially abrogate the rule – a compromise the very same Congress had enacted five months earlier with respect to prosecutions in the District of Columbia.

Second, Senator McClellan, who introduced § 3501 and was the floor manager of the Omnibus Act, made clear that § 3501(a)-(b) and § 3501(c) were intended to be independent provisions addressing separate issues – subsections (a) and (b) were to overrule *Miranda*, and subsection (c) (as originally

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[9] The Omnibus Act originated in the House as H.R. 5037, 90th Cong., 1st Sess. (1967), and was limited to the provision of federal grants and other assistance to local law enforcement agencies. After passage in the House, the bill was referred to the Senate Judiciary Committee, where its provisions were expanded and made Title I of a new Senate bill, S. 917, 90th Cong., 2d Sess. (1968). Section 3501 began as a separate bill, S. 674, 90th Cong., 1st Sess. (1967), and was wholly incorporated into Title II of S. 917 by the Judiciary Committee. *See* S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2123 (1968). Title II also sought, *inter alia*, to overrule *Miranda*. *See id.* at 2123-53. The provision overruling *Miranda* was approved without substantive amendment. 114 Cong. Rec. 14,172, 14,798 (1968). S. 917 was further expanded in committee and on the Senate floor, ultimately comprising ten substantive titles. It was then inserted into H.R. 5037 in lieu of that bill's original text, and was passed by the Senate. *Id.* at 14,798. The House approved the Senate version of H.R. 5037 soon thereafter. *Id.* at 16,299-300.

proposed) was to overrule *McNabb* and *Mallory*. Indeed, the provisions were voted on separately by the Senate, demonstrating that subsection (c) alone was meant to address the *McNabb-Mallory* rule. The Third Circuit majority's reading of § 3501 – that subsection (a) entirely nullifies the *McNabb-Mallory* rule – is therefore incorrect.

(a) Proposed § 3501(c) was amended to effect a compromise partially codifying the *McNabb-Mallory* rule.

Section 3501(c), as originally proposed, completely abrogated the *McNabb-Mallory* rule. Its text made that purpose unmistakable:

> (c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein . . . shall not be inadmissible solely because of delay in bringing such person before a [magistrate] if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury.

S. 917, 90th Cong., 2d Sess. (1968). The Senate Report on the bill and the early floor debate confirm this reading.[10]

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[10] *See, e.g.*, S. Rep. No. 1097, *supra*, at 2124-25; 114 Cong. Rec. 11,206 (remarks of Sen. McClellan) ("[V]oluntariness should

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But subsection (c) encountered significant opposition, and was eventually amended on the Senate floor. From the beginning, the debate on the provision was driven by one overarching concern: the amount of interrogation, and thus presentment delay, that should be permitted. Detractors of the *McNabb-Mallory* rule emphasized that confessions were being suppressed as a result of minimal delay, citing *Alston*

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be the only test for the court in determining admissibility. . . . * * * And that is the procedure that title II would restore."); *id.* at 11,234 (remarks of Sen. Tydings) ("[T]itle II . . . overrules [the Supreme Court's] decision[ ] in the *Mallory* case."); *id.* at 11,594 (remarks of Sen. Morse) ("[Section 3501(c)] would overrule the Supreme Court's decision in [*Mallory*]."); *id.* at 11,595 (same) (quoting U.S. Attorney General's view that § 3501(c) represents an "outright repeal of *Mallory*"); *id.* at 11,612 (remarks of Sen. Thurmond) ("[Title II] would set aside the inflexible and technical rule[ ] established in [*Mallory*]."); *id.* at 11,745 (remarks of Sen. Brooke) ("[W]e have the Senate attempting to overrule a decision of the U.S. Supreme Court, this time [*Mallory*]."); *id.* at 12,292, 12,293 (remarks of Sen. Fong) ("[T]itle II, if enacted, would . . . [o]verrrule the Supreme Court's decision in [*Mallory*]. * * * The outright repeal of *Mallory* by § 3501(c) would leave [Federal Rule of Criminal Procedure 5(a)] without a remedy."); *id.* at 12,924 (remarks of Sen. Young) ("[Title II] would have the effect of reversing [*Mallory*]. . . ."); *id.* at 14,016 (remarks of Sen. Stennis) ("[Section 3501(c)] will counteract the so-called *Mallory* rule. . . . * * * Mere delay would cease to be an absolute and automatic cause for excluding valuable and often essential evidence."); *id.* at 14,131 (remarks of Sen. Bible) ("The design of [§ 3501(c)] is to overcome a serious impediment to the administration of justice . . . caused by [*Mallory*]."); *id.* at 14,158 (remarks of Sen. Hart) ("[T]itle II . . . would repeal such Supreme Court cases as [*Mallory*]."); *id.* at 14,167 (remarks of Sen. McIntyre) ("Section 3501(c) . . . overrul[es] the Supreme Court's decision in [*Mallory*].").

v. United States, 348 F.2d 72 (D.C. Cir. 1965), in which a confession was suppressed due to the presentment delay occasioned by five minutes of police questioning.[11] The Senate Report began by decrying *Alston*, S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2124 (1968), and Senator McClellan opened debate on Title II by referring to the case as "the acme of irrationality and the ultimate absurdity," 114 Cong. Rec. 11,202 (1968). Supporters of the *McNabb-Mallory* rule likewise focused on the issues of interrogation and presentment delay, but emphasized instead that § 3501(c), as proposed, would permit unlimited interrogation and delay.[12]

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[11] *See, e.g.*, 114 Cong. Rec. 13,846 (remarks of Sen. McClellan) ("The phrase 'without unnecessary delay,' under the distorted construction now applied by this court, means that the police cannot detain and talk to, or interrogate for even 5 minutes, one who is a suspect of having committed a crime of violence."); *id.* at 14,017 (remarks of Sen. Stennis) ("The length of delay which invalidates a voluntary confession has been steadily reduced by the courts from 5 hours to 5 minutes and has been applied in countless cases to free self-confessed criminals of every kind, including murderers."); *id.* at 14,132-33 (remarks of Sen. Bible) (citing *Alston* and other cases, and concluding that "voluntarily given statements have been excluded solely on the basis of very minimal delay"); *id.* at 14,168 (remarks of Sen. McIntyre) ("I have been alarmed by the far-reaching applications of legal criteria made by the Supreme Court in determining the admissibility of confessions. . . .").

[12] *See, e.g.*, 114 Cong. Rec. 11,740, 13,990 (remarks of Sen. Tydings) ("The effect [of Title II] would be to permit Federal criminal suspects to be questioned indefinitely before they are presented to a committing magistrate. . . ."); *id.* at 11,894 (same)

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Both sides recognized, however, that they were not writing on a clean slate with respect to the *McNabb-Mallory* rule. The very same Congress, only five months earlier, had legislated on the rule in the context of prosecutions in the District of Columbia. Title III of An Act Relating to Crime and Criminal Procedure in the District of Columbia, Pub. L. 90-226, § 301(b), 81 Stat. 734, 735-36 (1967), popularly known as the "D.C. Crime Act," provided that certain confessions, *taken within a fixed period after a suspect's arrest* (in that statute, three hours), would not be inadmissible solely due to presentment delay:

> (b) Any statement, admission, or confession made by an arrested person within three hours immediately following his arrest shall not be excluded from evidence in the courts of the District of Columbia solely because of delay in presentment.

Id.

It is beyond dispute that this language was intended to strike a compromise on the *McNabb-Mallory* rule – rendering it inapplicable to confessions

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("The delay could be 2 months, and it would not be conclusive as to voluntariness."); *id.* at 12,290 (remarks of Sen. Fong) ("Title II . . . would open the doors to such practices as holding suspects incommunicado for an indefinite period. . . . "); *id.* at 14,135 (remarks of Sen. Brooke) ("No limitations are placed upon the length of time which may be permitted to elapse between arrest and arraignment. . . . [Section 3501(c)] would invite indefinite delays before arraignment.").

taken within the time limitation, but codifying the rule in full force for confessions taken outside that period. The Senate Report on the bill, H.R. 10783, 90th Cong., 1st Sess. (1967), makes this point particularly clear:

> The committee's recommendations as contained in . . . the instant bill *represent[] a legislative effort to retain for persons charged with crime those essential individual rights that the* Mallory *rule and its subsequent case law refinements have made.* At the same time the recommendation strikes a balance point in permitting police to carry on proper and necessary questioning under clearly defined limitations.

S. Rep. No. 912, 90th Cong., 1st Sess., at 18 (1967) (quoting S. Rep. No. 600, 89th Cong., 1st Sess., at 19-20 (1965)) (emphasis added).[13] Thus, confessions

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[13] *Accord* S. Rep. No. 912, *supra*, at 15 ("The interpretation of the *Mallory* rule and rule 5(a) in the District of Columbia has been that . . . voluntarily given statements have been excluded in a significant number of cases on the basis of very minimal delay alone. The committee feels that this interpretation of the law is wrong and that title III is designed to strike a proper balance in this difficult area."); *id.* at 16 ("The problem which gives rise to the legislative proposal before the committee lies not with the *Mallory* rule but with its application in the District of Columbia.") (quoting testimony of U.S. Deputy Attorney General Nicholas B. Katzenbach before the Senate Judiciary Committee (Nov. 5, 1963)). Committee reports on a bill are the most authoritative source for determining Congress's intent, provided the statute is enacted in the form reported by the committee. *Garcia v. United States*, 469 U.S. 70, 76 (1984).

taken beyond the three-hour time limitation were made subject to the *McNabb-Mallory* rule, to be admitted or excluded as courts determined under the rule's definition of unnecessary delay:

> [S]tatements [taken outside the three-hour period] will not be protected by title III, but they may still be admitted in evidence so long as they were obtained with full regard for the constitutional and other rights of the arrested person, *including his rights under Rule 5(a) and the* Mallory *decision*.

Id. at 17 (emphasis added).

The D.C. Crime Act was in the forefront of senators' minds during the drafting and debate of Title II of the Omnibus Act. It was repeatedly discussed throughout the debate,[14] and Senator Bible, the

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[14] *See, e.g.*, 114 Cong. Rec. 11,745 (remarks of Sen. Brooke) ("The Senate in fact considered this question a short time ago in connection with the District of Columbia Crime Act. . . . "); *id.* at 11,754 (remarks of Sen. Bible) ("[A]s the Senate knows, [the efforts of the Committee on the District of Columbia] bore fruit with the approval of a District of Columbia omnibus crime bill last December – Public Law 90-226. * * * I am pleased to know that our spadework on [problems caused by *Mallory* has] been helpful to [Senator McClellan] and the Committee on the Judiciary in their development of the present bill."); *id.* at 14,131-33 (same) (discussing D.C. Crime Act extensively); *id.* at 12,292-93 (remarks of Sen. Fong) ("Unlike the [D.C. Crime Act], enacted in the first session of this Congress, no time limit or other safeguards on interrogation are provided."); *id.* at 14,165 (remarks of Sen. Metcalf) ("Last session hearings were held on [the D.C. Crime Act] which less than 5 months ago passed this

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chairman of the Committee on the District of Columbia and floor manager of the D.C. Crime Act, worked closely with Senator McClellan in crafting the Omnibus Act. 114 Cong. Rec. 11,202, 11,754; S. Rep. No. 1097, *supra*, at 2124-25. It was understood by all that proposed § 3501(c), in abrogating the *McNabb-Mallory* rule entirely, went far beyond Title III of the D.C. Crime Act. As Senator Bible himself put it,

> The [D.C. Crime Act] has already taken the first step toward loosening the noose that the *Mallory* rule and subsequent court decisions placed around the neck of law enforcement here in the Nation's Capital. *Title II of the present bill proposes a further loosening of this noose not only here in the District of Columbia but throughout the Nation.*

Id. at 14,133 (emphasis added).[15]

Against this backdrop, the Senate considered two critical amendments to Title II: an amendment

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same Congress and became law. The *Mallory* and *Miranda* decisions were considered during the course of those hearings.").

[15] *Accord* 114 Cong. Rec. 13,848 (remarks of Sen. McClellan) (noting that D.C. Crime Act only "revised" the *McNabb-Mallory* rule); *id.* at 11,745 (remarks of Sen. Brooke) ("[The D.C. Crime Act] . . . authorized a maximum 3-hour period for interrogation. . . . Today, however, an effort is being made to authorize indefinite periods of interrogation between arrest and charge."); *id.* at 12,293, 14,136 (remarks of Sen. Fong) ("Even in the recently enacted [D.C. Crime Act], the Congress did not see fit to repeal *Mallory* completely. . . . "); *id.* at 14,165 (remarks of Sen. Metcalf) ("I fail to understand why suddenly I find myself faced with a bill that would abrogate [the D.C. Crime Act].").

proposed by Senator Tydings to strike the title in its entirety, leaving the *McNabb-Mallory* rule wholly intact (Amendment No. 788); and – subsequently – an amendment by Senator Scott to add a six-hour time limitation to § 3501(c), akin to the three-hour provision of the D.C. Crime Act (Amendment No. 805). 114 Cong. Rec. 13,651, 13,830 (Amendment No. 788); 14,184-85 (Amendment No. 805).

Debate on the Tydings Amendment focused once again on the extremes of presentment delay – the very minimal delay that had led to the exclusion of the confession in *Alston*, and the unlimited delay permitted by proposed § 3501(c). 114 Cong. Rec. 14,172-73 (remarks of Sen. McClellan), 14,174 (remarks of Sen. Cooper). But then, in the midst of the debate, Senator McClellan agreed to consider a compromise provision – "modif[ying]" the *McNabb-Mallory* rule along the lines of the D.C. Crime Act – if the Tydings Amendment were first rejected:

> If later a Senator wishes to offer an amendment, that can be done, but it cannot be done on this vote. The matter will be open for amendment. A suggestion has been made for 6 hours. I said I would consider it, and I mean that in all good faith. *There must be some modification of the* [McNabb-Mallory] *rule because it is not fair now and it does an injustice.*

Id. at 14,173 (emphasis added).

The Tydings Amendment was rejected, and the compromise provision was then offered by Senator Scott, as Amendment No. 805. 114 Cong. Rec. 14,174-75, 14,184-85. The Scott Amendment added to the end of proposed § 3501(c) the eventually-enacted language " . . . and if such confession was made or given by such person within six hours immediately following his arrest or other detention."[16] *Id.* Senator Scott described the amendment as duplicating the effect of Title III of the D.C. Crime Act:

> My amendment is an attempt to conform, as nearly as practicable, to title III of Public Law 90-226, the District of Columbia crime bill enacted last year, which provides that confessions obtained during periods of interrogation up to 3 hours shall not be excluded from evidence in the courts of the District of Columbia. *My amendment provides that the period during which confessions may be received or interrogations may continue, which may or may not result in a confession, shall in no case exceed 6 hours.*

Id. at 14,184 (emphasis added).

Honoring the commitment he had made to secure rejection of the Tydings Amendment, Senator McClellan reconsidered his original position in favor

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[16] The proviso of enacted § 3501(c), limiting the applicability of the six-hour limitation in cases of reasonable delay necessitated by travel to a distant magistrate, was added later by separate amendment. 114 Cong. Rec. 14,787.

of complete abrogation of the *McNabb-Mallory* rule and embraced the Scott Amendment as a fair compromise:

> I say to [Senator Scott] that I want to be reasonable in this matter. I do not want an unreasonable time, but I do want an opportunity for the law enforcement officers to perform their duty. *I think this is a fair adjustment of the differences of opinion about this matter.* * * *
>
> I cannot [agree to the three-hour limitation of the D.C. Crime Act], because I have yielded here, in order to provide some time; so that they cannot say it is completely arbitrary. *I have made adjustments in my own thinking about it and reached this agreement. The bill was reported without any limitation, and I think I am being fair.*

114 Cong. Rec. 14,185 (emphasis added).[17]

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[17] Other senators similarly understood that time limitations as contained in the D.C. Crime Act and the Scott Amendment amounted to a compromise position on the *McNabb-Mallory* rule. For instance, Senator Metcalf stated:

> Last December, after discussion and debate, we reached [in the D.C. Crime Act] a compromise in connection with the *Mallory* case. Many people thought that compromise was going too far, but at least we provided that 3 hours would be a reasonable time to hold persons.

114 Cong. Rec. 14,173.

The Scott Amendment was approved, and the bill passed. 114 Cong. Rec. 14,186, 14,798. In adopting the compromise embodied in Title II and the D.C. Crime Act,[18] both the advocates and opponents of the originally-proposed § 3501(c) achieved some measure of success: there would be no more automatic suppression of confessions during periods of minimal delay (as had occurred in *Alston*), and the threat of indefinite incommunicado questioning would be lessened. No one, however, intended to abrogate the *McNabb-Mallory* rule entirely or to make voluntariness the sole test for the admissibility of confessions taken more than six hours after arrest.

The bill was then returned to the House, where it passed after minimal further debate. 114 Cong. Rec. 16,065-78, 16,271-300. Title II was mentioned by several representatives on the House floor, some of whom characterized it as overruling *Mallory* – to what degree was often left unspecified.[19] Other

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[18] *See also Frazier v. United States*, 419 F.2d 1161, 1171 n.2 (D.C. Cir. 1969) (Burger, C.J., concurring in part and dissenting in part) ("Title II [of the Omnibus Act] substantially incorporates Title III of the District of Columbia Crime Bill.").

[19] *See, e.g.*, 114 Cong. Rec. 16,066 (remarks of Rep. Celler) ("Title II would turn the clock backward to the day before *Mallory*. . . . "); *id.* at 16,273 (remarks of Rep. Rogers) ("Delay in bringing a suspect before a committing magistrate . . . would not be the sole criterion to be considered."); *id.* at 16,275 (remarks of Rep. MacGregor) ("Section 3501(c) overrules the *Mallory* decision."); *id.* at 16,276 (remarks of Rep. Anderson) ("Section 3501(c) does overrule the *Mallory* decision. * * * Specifically, a 6-hour delay before the suspect is brought before a committing

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representatives recognized the Senate bill as a compromise on the issue of rolling back Supreme Court decisions.[20] None of these remarks is particularly persuasive evidence of Congress's intent in enacting § 3501, however, because each was made in passing by individual members during floor debate in the chamber in which § 3501 did not originate. *See, e.g.*, *Garcia v. United States*, 469 U.S. 70, 76 (1984) (eschewing reliance on general comments during floor debate); *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956) (when legislative history in chambers conflicts, history from chamber in which statutory language originated more persuasive).

The authoritative legislative history with respect to § 3501 and the Scott Amendment is the remarks of Senators McClellan and Scott, the sponsor and floor

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magistrate would be permitted."); *id.* at 16,295 (remarks of Rep. Reid) ("Title II would reverse [*Mallory*]. . . .").

[20] *See, e.g.*, 114 Cong. Rec. 16,076-77 (remarks of Rep. Sikes) ("The language correcting some of the policies laid down by the Supreme Court is the most important that has been brought to the House in many months on this subject. In fact, it is the only language which has cleared the Senate which offers any hope of correcting the extremely damaging actions of the Supreme Court."); *id.* at 16,271 (remarks of Rep. Smith) ("Undoubtedly, some feel that the authority of the Supreme Court is being restricted while others may feel that the measure should go further in restricting the authority of the Supreme Court."); *id.* at 16,285 (remarks of Rep. Roth) ("This bill contains provisions which somewhat modify certain court decisions."); *id.* at 16,297-98 (remarks of Rep. Pollock) ("The question in my mind concerning Title II is whether we in Congress are today going far enough to overturn some of the Supreme Court decisions. . . .").

manager of the bill and the proponent of the amendment in question, respectively. *See, e.g.*, *Lewis v. United States*, 445 U.S. 55, 63 (1980) (remarks of bill's sponsor and floor manager entitled to weight); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (remarks of amendment's proponent entitled to weight). The remarks of these senators during consideration of the Tydings and Scott Amendments confirm beyond doubt an intent to retain the *McNabb-Mallory* rule for confessions taken more than six hours after arrest. Indeed, the lower courts that have examined the legislative history agree that it supports this reading of the statute. *Perez*, 733 F.2d at 1033-34; *Alvarez-Sanchez*, 975 F.2d at 1402; *Superville*, 40 F. Supp. 2d at 682-83; *United States v. Wilbon*, 911 F. Supp. 1420, 1428-30 (D.N.M. 1995).

(b) Senator McClellan's management of Title II during debate on the Tydings Amendment and the Scott Amendment clarifies that § 3501(c) alone was intended to address the *McNabb-Mallory* rule.

The legislative history likewise confirms that subsection (c) is the only provision of § 3501 meant to address the *McNabb-Mallory* rule, and that subsections (a) and (b) were not intended to have any effect on the rule. These subsections were designed to operate independently, addressing discrete issues

pertaining to the admissibility of confessions: subsections (a) and (b) were meant to overrule *Miranda*, and subsection (c) – alone – was meant to address the *McNabb-Mallory* rule.[21]

The independent, parallel functioning of subsections (a)-(b) and (c) is demonstrated most clearly by Senator McClellan's management of Title II during debate on the Tydings and Scott Amendments. The Tydings Amendment was submitted as a motion to strike Title II in its entirety.[22] 114 Cong. Rec. 13,651,

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[21] *See, e.g.*, 114 Cong. Rec. 11,594 (remarks of Sen. Morse) ("Section 3501(c) [pre-amendment version] provides that a confession shall not be inadmissible in a Federal court solely because of delay between arrest and arraignment of the defendant. This provision would overrule the Supreme Court's decision in [*Mallory*]."); *id.* at 12,293 (remarks of Sen. Fong) ("The outright repeal of *Mallory* by § 3501(c) [pre-amendment version] would leave the 'without unnecessary delay' provision of rule 5(a) of the Federal Rules of Criminal Procedure as a rule without a remedy."); *id.* at 13,846 (remarks of Sen. McClellan) ("Title II would return to the rule of reason [in cases of presentment delay] by providing that – § 3501(c) [quoting pre-amendment subsection (c)]."); *id.* at 14,131 (remarks of Sen. Bible) ("The design of [pre-amendment subsection (c)] is to overcome a serious impediment to the administration of justice in the Federal criminal courts caused by [*Mallory*]."); *id.* at 14,184 (remarks of Sen. Spong) ("There is ample statistical evidence to show the problems in criminal prosecution caused by [*Mallory*]. * * * Accordingly, I supported paragraph (c) of § 3501, as well as paragraphs (d) and (e) of the same section.").

[22] A separate amendment proposed by Senator Tydings replaced Title II with a directive that Congress undertake a factual investigation into the impact of Supreme Court criminal procedure decisions on law enforcement. 114 Cong. Rec. 13,830 (Amendment No. 804). Senator Hart had previously proposed a

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13,830 (Amendment No. 788). In response, Senator McClellan divided Title II so that the Senate could separately vote to strike or retain each of its constituent parts. *Id.* at 14,156-57.

Senator McClellan divided the title into several parts, including one division covering § 3501(a) and (b), and a separate division covering § 3501(c). 114 Cong. Rec. 14,171. He defined the § 3501(a)-(b) division as relating to *Miranda*, and the § 3501(c) division as relating to the *McNabb-Mallory* rule:

> [Division one] has to do with the *Miranda* decision and says that the *Miranda* case shall be taken into consideration by the trial judge in determining whether a statement is voluntary and if he determines that the confession is voluntary, he then submits it to the jury. . . . * * *
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> [With respect to division two,] the Senate has [previously] voted on the *Mallory* rule. . . . The Senate approved of this once, and I hope it does so again.

Id. at 14,171-72. Senator Tydings concurred in the division of Title II, describing it more succinctly:

> Division No. 1 is the *Miranda* decision. Division No. 2 is the *Mallory* decision.

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similar amendment. *Id.* (Amendment No. 803). Amendments 804 and 803 were rejected and withdrawn, respectively. *Id.* at 14,157, 14,171.

Id. at 14,172. On the ensuing votes, § 3501(a) and (b) (overruling *Miranda*) was retained in the bill by a vote of 55-29, and § 3501(c) (abrogating the *McNabb-Mallory* rule)[23] was retained by a vote of 58-26. *Id.* at 14,172, 14,174-75.

Clearly then, it was understood that § 3501(c), rather than § 3501(a)-(b), addressed the *McNabb-Mallory* rule. If it were otherwise, dividing Title II and voting separately on subsections (a)-(b) and (c) would have been a meaningless exercise, since a vote to retain subsections (a) and (b) would have abrogated the *McNabb-Mallory* rule, even if subsection (c) had been stricken. Thus, just as reading subsection (a)'s voluntariness standard as nullifying the rule renders subsection (c) superfluous, *see supra* pp. 29-30, such a reading renders the separate vote on subsection (c) an empty act – an equally intolerable consequence. By dividing Title II, identifying subsections (a) and (b) as *Miranda*-related and subsection (c) as *Mallory*-related, and voting separately (by different margins) to retain the provisions, the Senate confirmed that subsection (c), alone, addresses the *McNabb-Mallory* rule.

Senator McClellan again demonstrated the intended independent operation of subsections (a)-(b) and (c) during consideration of the Scott Amendment. As introduced, the Scott Amendment would

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[23] The motion to strike proceeded on the original version of Title II – before the Scott Amendment added the six-hour limitation to § 3501(c). 114 Cong. Rec. 14,172-75.

have stricken the last clause of originally-proposed subsection (c) (" . . . is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury") and replaced it with the new text (" . . . was made or given by such person within [six] hours immediately following the arrest or other detention"). 114 Cong. Rec. 14,184.

Senator McClellan, however, insisted that the new language *follow*, rather than replace, the existing text. 114 Cong. Rec. 14,184. He explained that the existing text – providing a separate voluntariness standard for admissibility in subsection (c) – needed to be retained in order to render inadmissible involuntary confessions taken within six hours of arrest. *Id.* But if subsections (a) and (b) provided a voluntariness standard applicable in the context of the *McNabb-Mallory* rule, there would be no need to retain a separate voluntariness standard within subsection (c). By insisting on parallel voluntariness standards, Senator McClellen confirmed yet again that subsections (a) and (b) were intended to operate independently of subsection (c), and that the *McNabb-Mallory* rule is addressed by subsection (c) alone. As such, subsection (a) does not override the partial codification of the *McNabb-Mallory* rule in subsection (c).

C. Interpreting § 3501(c) as retaining a modified *McNabb-Mallory* rule will assist law enforcement and the courts by providing a bright-line rule and will guard against the use of delay to elicit *Miranda* waivers.

The effect of interpreting § 3501(c) so as to retain a modified *McNabb-Mallory* rule will be beneficial for law enforcement and the courts. The six-hour time limitation sets a bright-line rule that is much easier for law enforcement and the courts to implement than the totality-of-the-circumstances test used for determining voluntariness under § 3501(a) and (b). Giving full effect to § 3501(c) as a codification of the *McNabb-Mallory* rule with a six-hour exception thus facilitates the administration of justice. As this Court observed in *Dickerson* when it upheld *Miranda*, the totality-of-the-circumstances test of § 3501 is difficult "for law enforcement officers to conform to, and for the courts to apply in a consistent manner." 530 U.S. at 444. With a clear six-hour rule, federal law enforcement officers will know that as long as they take an uncoerced confession within six hours of arrest, it will be admissible under § 3501(c). Confessions taken within this time period will also be much less likely to be deemed involuntary as a result of undue delay under subsections (a) and (b).

On the other hand, if voluntariness is the sole criterion for admissibility, law enforcement officers have no real incentive to respect the right of prompt presentment or § 3501(c)'s six-hour limitation.

Indeed, that is precisely what happened in Mr. Corley's case. Courts then must grapple with the thorny issue of how long of a delay renders a confession involuntary. Inconsistent rulings are inevitable. For this reason, the Court observed in a similar context that having a bright-line rule "conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness." *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990) (reaffirming rule that once defendant invokes right to counsel, all questioning must cease until counsel is present). A bright-line rule, the Court explained, provides "clarity" and "certainty," and "has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Id. See also Davis v. United States*, 512 U.S. 452, 461 (1994) (rule requiring all questioning cease once defendant requests counsel "provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information").

The *McNabb-Mallory* rule, as codified in § 3501(c), is also a necessary adjunct to *Miranda*. The rule protects the prophylactic value of *Miranda* warnings by ensuring that presentment delay itself is not used as a means of pressuring those arrested to waive their rights. As the Court stated, "the techniques of police questioning and the nature of custodial

surroundings produce an inherently coercive situation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 247 (1973). The longer a person is subjected to police custody without an opportunity to see a neutral magistrate, the more "inherently coercive" the situation becomes. Delay then becomes a means of undercutting the value of *Miranda* warnings by creating pressure to waive one's rights. *Miranda* does nothing to protect against such delay. For precisely this reason, the *Miranda* Court noted the important prophylactic value of the *McNabb-Mallory* rule, stating that its *Miranda* ruling "does not indicate in any manner, of course, that these rules [Rule 5(a) and *McNabb-Mallory*] can be disregarded." *Miranda*, 384 U.S. at 463 n.32. Accordingly, the *McNabb-Mallory* rule, as codified in § 3501(c), ensures that the prophylactic value of *Miranda* warnings is not undercut by delay in presentment.

II. MR. CORLEY'S TWO CONFESSIONS WERE TAKEN OUTSIDE THE SIX-HOUR TIME PERIOD PROVIDED IN 18 U.S.C. § 3501(c), AND BECAUSE THE DELAY IN HIS PRESENTMENT WAS UNNECESSARY AND UNREASONABLE, THE TWO CONFESSIONS WERE INADMISSIBLE UNDER THE *McNABB-MALLORY* RULE.

This case presents a paradigmatic example of unreasonable presentment delay: delay for the purpose of interrogation. It illustrates the importance of giving effect to § 3501(c) and the *McNabb-Mallory*

rule. The FBI agents delayed Mr. Corley's presentment to a federal magistrate for the purpose of obtaining his oral and written confessions outside § 3501(c)'s six-hour time limitation. In view of the purposefulness of the agents' actions, the delay of over twenty-nine hours in presentment was plainly unreasonable and unnecessary under Rule 5(a) and *McNabb-Mallory*. The confessions obtained through exploitation of that delay should not have been admitted at trial.

A. The confessions were taken well outside the six-hour time limitation of § 3501(c).

Both the majority and the dissent in the Third Circuit agreed that Mr. Corley's oral and written confessions were taken outside the six-hour time period of § 3501(c). J.A. 197 n.7, 227-28. The government concedes this as well. J.A. 228; Brief for Appellee United States at 17, *United States v. Johnnie Corley*, No. 04-4716 (3d Cir. June 2, 2006) ("The statute plainly provides for a safe harbor of six hours, and Corley's first confession unquestionably came after that period."). The record allows no other conclusion.

The FBI agents arrested Mr. Corley on Wednesday, September 17, 2003, at 8:00 a.m. in Sharon Hill, a suburb of Philadelphia. But instead of taking him directly to Philadelphia for presentment before a federal magistrate, the agents held him for three

hours and forty-five minutes at the local Sharon Hill police station so that they could interview neighbors living near where Mr. Corley was arrested to "further [the] investigation." J.A. 40.

At about 11:45 a.m., agents drove Mr. Corley to Philadelphia, where they took him to a hospital to receive treatment for a minor cut on his hand, arriving at 12:12 p.m. They gave no explanation for why Mr. Corley was not either taken to the hospital sooner, or taken before a magistrate for presentment in the morning before going to the hospital. After being treated, Mr. Corley was discharged at 3:20 p.m. and driven a few blocks to the FBI office, arriving at 3:30 p.m. By this time, seven and one-half hours had already elapsed since the arrest, and thus the six-hour time limitation of § 3501(c) had already expired.

Still, the agents made no effort to present Mr. Corley to a magistrate, even though magistrates were readily available that Wednesday afternoon in the same building as the FBI office. J.A. 80, 237. Before presentment, the agents wanted a confession to the bank robbery. Indeed, all of the delay after 3:30 p.m. is attributable to the agents' openly-acknowledged desire to obtain a confession. As Trooper D'Angelo explained, instead of presenting Mr. Corley to a magistrate, his "chief purpose" that afternoon was "to obtain the confession." J.A. 69. So, for over an hour, without asking any questions, D'Angelo and Agent Roselli spoke to Mr. Corley about the benefits of cooperating with the government and how it could result in a lower sentence.

After reviewing a waiver-of-rights form at 5:07 p.m., Mr. Corley began giving his oral confession at 5:27 p.m. Nine hours and twenty-seven minutes had elapsed since his arrest at 8:00 a.m. that morning. This confession, which concluded at 6:38 p.m. (ten hours and thirty-eight minutes after arrest), was plainly not made "within six hours immediately following" Mr. Corley's arrest, and it therefore was outside the "time limitation" of § 3501(c).

After obtaining the oral confession, Agent Roselli still was not ready to present Mr. Corley to a magistrate. He wanted the confession in writing. But Mr. Corley said he was too tired, so the agents took him to the Federal Detention Center for the night. The next morning – Thursday – magistrate judges were holding arraignments at 10:00 a.m. Instead of taking Mr. Corley to the magistrate judge, however, the FBI agents brought him back to the FBI office at 10:30 a.m. for further questioning. FBI Agent Heaney candidly admitted that their desire to question Mr. Corley further was "the reason that Mr. Corley was not brought before a magistrate" that morning. J.A. 83. Mr. Corley finally signed a confession written by Roselli at 10:45 a.m. He was ultimately arraigned at about 1:30 p.m. that day – twenty-nine and a half hours after his arrest. Both confessions, accordingly, were outside the § 3501(c) six-hour time limitation.

B. The delay of over twenty-nine hours from arrest until presentment was unreasonable and unnecessary under Rule 5(a) and the *McNabb-Mallory* rule.

Because both confessions were outside the six-hour time limitation of § 3501(c), they are inadmissible under the *McNabb-Mallory* rule and Rule 5(a) if the delay in presentment was "unnecessary."[24] The delay of nearly four hours during which Mr. Corley was held at the Sharon Hill police station Wednesday morning was unnecessary, given that Mr. Corley could have been transported to Philadelphia during this time and either presented to a magistrate or treated at the hospital. Since the purpose of this delay was to allow the agents to conduct interviews of neighbors and "further [the] investigation," J.A. 40, it was plainly unnecessary. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (citing as example of unnecessary presentment delay "delays for the purpose of gathering additional evidence to justify the arrest"). The time spent in the hospital was also unnecessary, since it was not for a medical emergency but rather for minor care. J.A. 236-37 (Sloviter, J., dissenting). Moreover, even if the hospital treatment were considered a medical emergency necessitating immediate treatment, it cannot excuse or make

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[24] As Judge Sloviter observed, "[t]he courts have generally equated 'unnecessary' [with] 'unreasonable.'" J.A. 236 (Sloviter, J., dissenting).

necessary any of the delay after the hospital treatment.

All of the delay after 3:30 p.m. Wednesday, when Mr. Corley arrived at the FBI office from the hospital, was for the purpose of obtaining a confession and was therefore, by definition, "unnecessary." *See Mallory*, 354 U.S. at 455 (delay in presentment "must *not* be of a nature to give opportunity for extraction of a confession") (emphasis added); *United States v. Wilson*, 838 F.2d 1081, 1085 (9th Cir. 1988) (holding that the "desire of the officers to complete the interrogation is, perhaps, the most unreasonable excuse possible under § 3501(c)").[25] As in *Upshaw*, 335 U.S. at 414, the agents here readily admitted this improper purpose. *See* J.A. 53, 68-69, 138-39. And like the defendant in *Mallory*, Mr. Corley was "detained . . . within the vicinity of numerous committing magistrates." 354 U.S. at 455. All of this delay, accordingly, was unreasonable and unnecessary, and because the confessions were a direct result of this delay, they are inadmissible under the *McNabb-Mallory* rule, as codified in § 3501(c).

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[25] The unnecessary delay includes the overnight stay at the detention center, since Mr. Corley was held overnight in order to obtain the written confession and not because a magistrate was unavailable during the day of his arrest.

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be reversed, Mr. Corley's oral and written confessions should be held inadmissible, and the case remanded to the Court of Appeals with instructions to remand to the district court for a new trial.

Respectfully submitted,

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RESPONDENT'S BRIEF

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DEC 17 2008

No. 07-10441

In the Supreme Court of the United States

JOHNNIE CORLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether 18 U.S.C. 3501 authorizes the suppression of a voluntary confession made more than six hours after a defendant's arrest on federal charges, but before his initial appearance before a magistrate, because of a purportedly unreasonable delay in the defendant's presentment to the magistrate.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 175-240) is reported at 500 F.3d 210.[1] The order of the district court (Pet. App. C1-C6) is unreported.

JURISDICTION

The judgment of the court of appeals (J.A. 241-242) was entered on March 6, 2007. A petition for rehearing was denied on November 16, 2007 (J.A. 243-244). On February 5, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including April 14, 2008, and the petition was filed

[1] The version of the court of appeals' opinion that is contained in the appendix to the petition for a writ of certiorari is not separately paginated. This brief cites the version of the court of appeals' opinion that is reprinted in the joint appendix.

on that date. The petition for a writ of certiorari was granted on October 1, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-7a.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of conspiring to commit armed bank robbery, in violation of 18 U.S.C. 371, and armed bank robbery, in violation of 18 U.S.C. 2113(d). He was sentenced to 170 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. J.A. 175-240.

1. On June 16, 2003, three men robbed the Norsco Federal Credit Union in Norristown, Pennsylvania. Federal officials identified petitioner as a suspect in the robbery, and they later learned that there was an outstanding state bench warrant for his arrest for an unrelated crime. J.A. 178.

On September 17, 2003, a team of federal and state officers sought to execute the state arrest warrant. J.A. 178. Petitioner attempted to evade arrest: he backed his Jeep into an officer's car; pushed his nine-year-old daughter, who was a passenger in the Jeep, into another officer; and then led the officers on a foot chase down a public street, through private yards and a creek, and up an embankment. J.A. 14-16, 30, 108-113. At about 8:00 a.m., petitioner was ultimately arrested on charges of assaulting a federal officer. J.A. 28, 93, 178.

Petitioner's hand was injured during his altercation with the officers. J.A. 27-28, 114. At approximately

11:45 a.m., after having been processed at the Sharon Hill Borough Police Department, petitioner was transported to a hospital, where he received five stitches and medication. Petitioner was then taken to the Philadelphia FBI office and arrived at about 3:30 p.m. J.A. 48-51, 93-94, 178.

At the FBI office, petitioner was given food and drink and was informed that he was under arrest for an outstanding warrant and assaulting a federal officer and under investigation for the credit-union robbery. J.A. 40-41, 51, 178. At 5:07 p.m., petitioner was verbally informed of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), received a written advice-of-rights form, and signed a waiver. J.A. 59, 61, 115-116, 178. Between 5:27 and 6:38 p.m., petitioner orally confessed to the credit-union robbery. J.A. 45-46, 62, 117-123, 178.

The agents asked petitioner to make a written confession as well, but petitioner stated that he was tired and asked to continue the following day. The agents agreed, and the interrogation was suspended. At 10:30 a.m. the following morning, the interrogation resumed. J.A. 178. Petitioner was advised of his *Miranda* rights a second time, and he signed a written confession shortly thereafter. J.A. 84-85, 126-128, 172-174, 178-179. At 1:30 p.m., petitioner made his initial appearance before a federal magistrate judge with respect to the charge of assaulting a federal officer. JA 179.[2]

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[2] Some opinions of this Court, see, *e.g.*, *Mallory* v. *United States*, 354 U.S. 449, 454 (1957), refer to a defendant's first appearance before a magistrate generically as an "arraign[ment]." An "initial appearance" under Federal Rule of Criminal Procedure 5, which is sometimes called "presentment," differs from an "arraignment" under the federal rules. An "arraignment," which is the subject of Federal Rule of Criminal Procedure 10, refers to the defendant's subsequent appearance before

2. Petitioner moved to exclude his oral and written confessions, arguing that they were obtained in violation of Federal Rule of Criminal Procedure 5(a)(1)(A), which states, in pertinent part, that "[a] person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge."

The district court denied the motion. Pet. App. C1-C6. The court stated that Rule 5(a), coupled with this Court's decisions in *McNabb* v. *United States*, 318 U.S. 332 (1943), and *Mallory* v. *United States*, 354 U.S. 449 (1957), had provided for the suppression of a confession given after an "unreasonable delay" in presentment, but that rule had been "statutorily circumscribed" by 18 U.S.C. 3501(c). J.A. 94-95. According to the district court, Section 3501(c) "provides a 'safe harbor' for law enforcement, setting a six-hour window within which otherwise admissible confessions may not be excluded solely on the basis of the defendant not having been brought before a magistrate judge." Pet. App. C2-C3. The court concluded that the three-hour-and-forty-five-

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the court to enter a plea to charges set forth in an indictment or information. See 1 Charles Alan Wright, *Federal Practice and Procedure* § 71, at 76-77 (2d ed. 1982). When a defendant is presented before a magistrate judge (or state or local judicial officer, see Fed. R. Crim. P. 5(c)(1)(B)) pursuant to Rule 5(a), in contrast, he has been arrested but usually has not been indicted. The defendant is therefore not called upon to plead to charges at that time. See Fed. R. Crim. P. 5(d)(4). Instead, the magistrate judge conducting the presentment informs the defendant of "the complaint against [him]," his "right to retain counsel or to request that counsel be appointed if [he] cannot obtain counsel," "the circumstances, if any, under which [he] may secure pretrial release," "any right to a preliminary hearing," and his "right not to make a statement, and that any statement made may be used against [him]." Fed. R. Crim. P. 5(d)(1)(A)-(E). The magistrate judge who conducts the presentment also addresses the issue of bail. Fed. R. Crim. P. 5(d)(3).

minute period during which petitioner was receiving medical care "is excluded from the six-hour window provided by § 3501" and that petitioner's oral confession thus fell within the six-hour safe harbor. *Id.* at C4. With respect to petitioner's written confession, the district court concluded that "a break from interrogation requested by an arrestee who has already begun his confession does not constitute unreasonable delay under Rule 5(a)" and that "the period between [petitioner's] arrest and his written confession was not 'unnecessary' for the purposes of [that rule]." *Id.* at C4-C5.

3. A divided panel of the court of appeals affirmed in a published opinion. J.A. 175-240.

a. The majority explained that 18 U.S.C. 3501 was enacted in 1968 in response to this Court's decisions in *McNabb*, *Mallory*, and *Miranda*. J.A. 184. Section 3501(a) states that, in federal prosecutions, "a confession * * * shall be admissible in evidence if it is voluntarily given." 18 U.S.C. 3501(a). Section 3501(b) "instructs the trial judge to determine the voluntariness of a confession by 'tak[ing] into consideration all the circumstances surrounding the giving of [it],'" and it sets forth "a nonexclusive list" of five relevant circumstances. J.A. 185 (brackets in original) (quoting 18 U.S.C. 3501(b)). Section 3501(c) provides that a confession "shall not be inadmissible solely because of delay in bringing [the defendant] before a magistrate judge" so long as the "confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if [the] confession was made or given * * * within six hours immediately following [the defendant's] arrest." 18 U.S.C. 3501(c). Section 3501(c) further provides that the six-hour "time limitation * * * shall not apply in any case in which the delay in

bringing [the defendant] before [a] magistrate judge * * * beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge." *Ibid.*

Relying on its decision in *Government of the Virgin Islands* v. *Gereau*, 502 F.2d 914 (3d Cir. 1974), cert. denied, 420 U.S. 909 (1975), the court of appeals held that Section 3501(a) "makes voluntariness the sole criterion for admissibility of a confession." J.A. 189. The court explained that Section 3501(c) "instructs courts that they may not find a confession involuntary 'solely' because of the length of presentment delay where the confession is *otherwise* voluntary and where the delay is less than six hours (or longer than six hours but explained by transportation difficulties)." J.A. 191. Applying that standard, the court of appeals affirmed petitioner's convictions because it understood the district court to have held that petitioner's confessions were voluntary, petitioner had not "seriously dispute[d]" that conclusion, and the court of appeals "discern[ed] no error in it." J.A. 197. In light of that holding, the court of appeals found it "unnecessary * * * to address the [d]istrict [c]ourt's holding that [petitioner's] oral confession should be treated as having been made within six hours of arrest," although it observed that such a "conclusion is contrary to the text of the statute." J.A. 197 n.7.[3]

b. Judge Sloviter dissented. J.A. 217-240. In her view, the general rule is that "even a voluntary statement may be excluded if the presentment delay is unrea-

[3] The court of appeals also rejected a variety of other claims relating to petitioner's sentence that petitioner does not renew before this Court. J.A. 198-217.

sonable or unnecessary," J.A. 236, and Section 3501(c) merely creates a "safe-harbor period" during which a confession may be excluded only if it was involuntary, J.A. 238; see J.A. 236 (observing that "courts have generally equated 'unnecessary' [the term used in Federal Rule of Criminal Procedure 5(a)(1)(A)] to 'unreasonable' [which appears in the final clause of Section 3501(c)]"). Judge Sloviter also disagreed with the district court's conclusion that the time petitioner spent receiving medical treatment should be excluded for purposes of calculating the six-hour safe-harbor period, J.A. 227-228, and she argued that the delay in bringing petitioner before the magistrate had been "unnecessary" within the meaning of Federal Rule of Criminal Procedure 5(a)(1), see J.A. 236-240.

SUMMARY OF ARGUMENT

Petitioner's voluntary confessions were not inadmissible based on his claim of unreasonable delay in presentment. To the contrary, 18 U.S.C. 3501(a) and Federal Rule of Evidence 402 both mandated the admission of petitioner's voluntary confessions.

A. Section 3501(a) states a general rule that a voluntary confession "shall be admissible in evidence." Section 3501(b) makes delay in presentment to a magistrate a factor in the voluntariness analysis. Those provisions preclude suppression of a confession based on delay in presentment alone. Petitioner contends that Section 3501(c) requires exclusion of a confession made more than six hours after arrest where the additional delay was neither reasonable nor necessary. That reading of Section 3501(c) not only is out of sync with the general reluctance to adopt exclusionary rules because of the substantial costs they impose, but is also untenable as a matter of statutory construction.

Section 3501(c) was a legislative response to this Court's decisions in *McNabb* v. *United States*, 318 U.S. 332 (1943), and *Mallory* v. *United States*, 354 U.S. 449 (1957), which relied on this Court's supervisory authority over the federal courts to exclude confessions resulting from unreasonable delays in presentment. Unlike the *McNabb-Mallory* rule, however, Section 3501(c) does not explicitly call for the exclusion of *any* confession. It merely provides a safe harbor forbidding exclusion of confessions solely for unreasonable delay in presentment when the confession was made within six hours of arrest (plus reasonable transportation delays).

Petitioner asks this Court to draw a negative implication from Section 3501(c), such that delays *greater* than six hours result in exclusion. But a negative implication cannot displace the express command of Section 3501(a) that a voluntary confession is admissible. That is particularly true in light of the costs that such an exclusionary rule would impose and the fact that a consistent application of negative-implication principles to Section 3501(c) would produce untenable results. In particular, it would limit delays beyond six hours to transportation-related delays (and thus exclude situations involving medical emergencies and the unavailability of judges).

Nor can Section 3501(a) be displaced on the theory that Section 3501(c) is a more specific command that supersedes the general rule of Section 3501(a). That principle applies only where the two commands are inconsistent, and nothing in the safe-harbor provision of Section 3501(c) conflicts with the rule of admissibility under Section 3501(a). Petitioner also cannot convert Section 3501(c) into a rule of exclusion based on the principle that it would otherwise be rendered superfluous. Section 3501(c)'s safe harbor provision clarifies the

law of admissibility in one particular situation, even if the general voluntariness rule would lead to the same result in case-by-case application. There is no rule against Congress taking a belt-and-suspenders approach to addressing an issue. And it does not rewrite Section 3501(c) to treat its reference to admissibility as a reiteration of voluntariness in light of the overriding command of voluntariness in Section 3501(a).

B. Petitioner also seems to suggest that, even if Section 3501 does not affirmatively mandate suppression, it left the *McNabb-Mallory* rule intact for delays in presentment of more than six hours. To the extent that petitioner would read Section 3501(a) that way, the statute does not assist him. In Federal Rule of Evidence 402, Congress provided that all relevant evidence is admissible unless otherwise provided by the Constitution, a statute, the evidence rules, or other rules promulgated by this Court pursuant to statutory authority. Because the *McNabb-Mallory* rule was announced under this Court's supervisory powers, it must yield to a valid Act of Congress. The Rules of Evidence were enacted by Congress and thus displace contrary rules adopted under this Court's supervisory powers. Accordingly, if Section 3501 were interpreted as leaving intact the *McNabb-Mallory* rule except for pre-presentment confessions taken within six hours of arrest, Federal Rule of Evidence 402 eliminated that remaining vestige of *McNabb-Mallory*.

C. Because the statutory text provides a clear answer to the question presented, there is no need to resort to legislative history. But in any event, the legislative history of Section 3501 does not justify interpreting the statute to contain an implicit exclusionary rule. The original version of the bill that became Section 3501 pro-

vided that a confession could not be suppressed solely because of a delay in presentment, if the confession were found voluntary. All recognized that that provision would eliminate the *McNabb-Mallory* rule. The six-hour limitation was adopted in an amendment proposed by Senator Scott; it served, among other things, to alleviate any constitutional problems that could have arisen if the bill were interpreted to preclude suppression of a confession taken after a two- or three-day delay in presentment. To the extent that the Scott amendment was also modeled on an earlier statute applicable to the District of Columbia, which limited but did not eliminate *McNabb-Mallory*, that statute (like Section 3501) did not expressly mandate the exclusion of evidence for delay in presentment. That reality compels petitioner to rely on the legislative history of the District of Columbia statute as a means of construing Section 3501. That form of double legislative hearsay is far too attenuated to have any bearing on the question presented here.

D. The court of appeals' interpretation of Section 3501(c) is not constitutionally doubtful, as petitioner believes and thus does not trigger the avoidance canon. According to petitioner, the holding below narrows the basis for finding a confession involuntary by precluding such a finding based solely on delay of less than six hours after arrest. Congress cannot limit the grounds on which a confession may be found constitutionally involuntary. But no serious argument can be made that any confession would be found involuntary based *solely* on a delay in presentment of six hours or less. Accordingly, no serious question would be raised even if Section 3501 is read to preclude a finding of involuntariness based solely on a delayed presentment of less than six hours.

E. Policy arguments likewise cannot justify reading an exclusionary rule into Section 3501(c). This Court has strongly cautioned against judicial imposition of exclusionary rules, see, *e.g.*, *Hudson* v. *Michigan*, 547 U.S. 586, 591 (2006); *McNeil* v. *Wisconsin*, 501 U.S. 171, 181 (1991), and the high cost of excluding voluntary confessions vastly outweighs any marginal benefits that would be achieved by encouraging prompt presentment. No demonstrated pattern of violations exists, and if one were to emerge, Congress and rule-making committees are well situated to frame the proper response.

The *McNabb-Mallory* rule was adopted long before this Court's announcement and refinement of *Miranda*. Today, in light of *Miranda*, Fourth Amendment restraints, and voluntariness doctrine, no necessity exists for a non-constitutional suppression rule based solely on delayed presentment. Arrested defendants who are interrogated in custody learn of their rights to silence and to counsel even before presentment to a magistrate. This case, in which petitioner twice validly waived his *Miranda* rights and asked to rest overnight before reducing his oral confession to writing, illustrates that delayed presentment is not so inherently oppressive as to warrant a nonconstitutional suppression rule. And, to the extent that petitioner suggests that a bright-line rule would facilitate police compliance, law enforcement can adopt such a rule if it is deemed beneficial. But society should not be compelled to pay the price of excluded confessions in order to enforce such a rule—particularly when petitioner's proposed, extra-statutory, rule of requiring suppression when there is "unreasonable or unnecessary" delay beyond six hours is itself far from clear.

F. To the extent that this Court concludes that delay in presentment, standing alone, can justify exclusion under Section 3501(c), it should remand for a determination of whether the delay in this case was unjustified. The district court addressed that issue, but the court of appeals did not, and this Court should not review the issue in the first instance.

ARGUMENT

EXCLUSION OF A VOLUNTARY CONFESSION IS NOT AN AUTHORIZED REMEDY FOR AN UNREASONABLE DELAY IN PRESENTMENT

Petitioner gave voluntary confessions, both orally and in writing, after being informed of and validly waiving his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). His detention was based on probable cause and he was presented to a magistrate within the time allowed under the Fourth Amendment. See *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991). Accordingly, nothing in the Constitution required the exclusion of his confessions.

The question here is whether a federal statute—18 U.S.C. 3501(c)—leads to a different result, either because it requires the suppression of confessions given after a six-hour delay in presentment, or because it preserves, for delays greater than six hours, the supervisory-powers rule of suppression announced by this Court in its pre-*Miranda* decisions in *McNabb* v. *United States*, 318 U.S. 332 (1943), and *Mallory* v. *United States*, 354 U.S. 449 (1957). The Court should be especially reluctant to recognize exclusionary rules because of their great societal costs, and, as matter of text, legislative history, and policy, suppression is not warranted here. Section 3501 itself creates only a rule of inclusion

of voluntary confessions. And any remaining supervisory powers rule of exclusion under *McNabb-Mallory* was superseded by Federal Rule of Evidence 402.

A. 18 U.S.C. 3501 Required Admission Of Petitioner's Voluntary Confessions

Section 3501(a) of Title 18 declares that, "[i]n any criminal prosecution brought by the United States or by the District of Columbia, a confession * * * *shall* be admissible in evidence if it is voluntarily given." 18 U.S.C. 3501(a) (emphasis added). Petitioner does not dispute the court of appeals' determination that his oral and written confessions were voluntary. Section 3501(a), standing alone, therefore mandates the admission of petitioner's oral and written confessions.[4]

Petitioner argues, however, that *Section 3501(c)* requires exclusion of confessions obtained more than six hours after arrest where there was an "unreasonable or unnecessary" delay in presenting the defendant to the magistrate judge. Pet. Br. 28. Petitioner is incorrect.

1. Section 3501(c) responded to two decisions of this Court under its supervisory powers. See p. 27, *infra*. In its 1943 decision in *McNabb*, the Court, "[i]n the exercise of its supervisory authority over the administration of criminal justice in the federal courts," 318 U.S. at 341, held inadmissible confessions obtained as the direct result of federal officers' failure to comply with statutes mandating that an arrested person be taken promptly

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[4] In *Dickerson* v. *United States*, 530 U.S. 428 (2000), this Court held that Section 3501(a) is unconstitutional insofar as it purports to require the admission of voluntary confessions obtained in violation of the procedures mandated by *Miranda*. See *id.* at 432. Petitioner does not contend, however, that the admission of his written and oral confessions violated either *Miranda* or any other "constitutional decision" (*ibid.*) of this Court.

before the nearest committing magistrate. The Court reasoned that the purpose of those statutes, and of similar state provisions, was to "check[] resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use." *Id.* at 344. In the Court's view, those practices had been used in *McNabb*, *id.* at 344-345, and therefore "to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law," *id.* at 345.[5]

The statutes on which the Court relied in *McNabb* were superseded by the 1946 adoption of Federal Rule of Criminal Procedure 5. The preliminary draft of Rule 5 had included a provision codifying the holding of *McNabb*, but that provision caused such controversy that it was omitted from the final draft submitted by the advisory committee to this Court and from the criminal rules as adopted. See 1 Charles Alan Wright, *Federal Practice and Procedure* § 72, at 80-84 (2d ed. 1982). The

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[5] The Court had granted certiorari in *McNabb* to review a claim that the confessions were involuntary under due process standards, but did not reach that issue because it raised the prompt presentment issue sua sponte. The proceedings on remand revealed that the Court had been mistaken in the factual premise of its analysis—*i.e.*, that the defendants were not presented before a commissioner promptly after their arrest. *McNabb* v. *United States*, 142 F.2d 904, 905-907 (6th Cir.), cert. denied, 323 U.S. 771 (1944). Scholars also later took issue with the legal premise of the Court's analysis in *McNabb*—*i.e.*, that the prompt-presentment statutes were intended to prevent prolonged interrogation or other third-degree practices. The legislative history of the federal statutes at issue in *McNabb* indicates that they were intended "to prevent federal marshals from increasing their fees for transporting prisoners farther than necessary." Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433, 1448 (1984).

Court nonetheless adhered to *McNabb* in the first case that it decided after the adoption of the new rule, *Upshaw* v. *United States*, 335 U.S. 410 (1948). In *Upshaw*, the Court reaffirmed the nonconstitutional basis for the *McNabb* doctrine (*id.* at 414 & n.2) and it rejected the contention that *McNabb* had done "no more than extend the meaning of 'involuntary' confessions to proscribe confessions induced by psychological coercion as well as those brought about by physical brutality." *Id.* at 412.

The Court invoked the *McNabb* rule again in *Mallory*, *supra*, where it further explained the rationale for the rule. The Court quoted the language of Rule 5(b) (now found in Rule 5(d)) to the effect that the judicial officer must inform the defendant of his rights to counsel and silence, and also must advise him that any statement he makes may be used against him. 354 U.S. at 453-454. The Court also determined that the defendant in *Mallory* had been denied the safeguards the prompt presentment requirement was designed to protect, noting that he had not been, before his eventual presentment, "told of his rights to counsel or to a preliminary examination before a magistrate, nor was he warned that he might keep silent and 'that any statement made by him may be used against him.'" *Id.* at 455 (quoting Fed. R. Crim. P. 4(d)(1)(E)).

2. Against the backdrop of those decisions, Congress enacted Section 3501. Unlike *McNabb* and *Mallory*, Section 3501(c) does not call for the exclusion of any confession, much less a confession whose admission is expressly mandated by a different section of the same statute. Section 3501(c) provides that confessions that satisfy certain criteria "shall *not* be *inadmissible* solely because of delay in bringing [the defendant] before a magistrate judge or other [appropriate] officer."

18 U.S.C. 3501(c) (emphases added). By its terms, therefore, Section 3501(c) prescribes only a rule of inclusion: it states that certain confessions shall be admitted without regard to whether some other source of law calls for their exclusion. When, in contrast, Congress instructs courts to exclude what might otherwise be highly relevant evidence, it typically provides that certain types of evidence "shall not * * * be admitted," 7 U.S.C. 2276(b)(2)(B), "shall not be admissible in evidence," 15 U.S.C. 2074(b), "[are] not admissible," 18 U.S.C. 3153(c)(3), or "are inadmissible," 18 U.S.C. 4014(d).[6] In fact, Congress adopted just such an exclusionary rule for evidence obtained as a result of unlawful wiretapping in the same Public Law that enacted Section 3501. See Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 216 (18 U.S.C. 2515) (providing that "no part of the contents of [any intercepted] communication and no evidence derived therefrom may be received in evidence in any * * * proceeding in or before any court").

Because Section 3501(c) is a rule of inclusion, it takes precedence over any earlier statute or rule with which it conflicts, as well as any rule of procedure promulgated by this Court pursuant to its supervisory authority over the lower federal courts. See, *e.g.*, *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988) (stating that "[e]ven a sensible and efficient use of the supervisory

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[6] See, *e.g.*, 10 U.S.C. 613a(b)(2), 1102(b)(1), 14104(b)(2); 13 U.S.C. 9(a); 14 U.S.C. 645(c)(1); 15 U.S.C. 281a, 6606(c)(3); 20 U.S.C. 9573(d)(1)(B); 23 U.S.C. 148(g)(4), 402(k)(1), 409; 26 U.S.C. 6103(i)(4)(C); 42 U.S.C. 2240, 7412(r)(6)(G), 10604(d); 42 U.S.C. 299b-22(a)(4), 37890g(a) (Supp. V 2005); 45 U.S.C. 744(d)(4); 49 U.S.C. 504(f), 1154(b), 20703(c), 45707; 49 U.S.C. 111(k)(2)(B)(ii) (Supp. V 2005); Pub. L. No. 110-161, Div. B, tit. II, 121 Stat. 1904 (2007); Fed. R. Crim. P. 58(c)(2)(B).

power . . . is invalid if it conflicts with constitutional or statutory provisions" (brackets in original) (quoting *Thomas* v. *Arn*, 474 U.S. 140, 148 (1985))). Thus, Section 3501(c) indisputably displaces the *McNabb-Mallory* rule with respect to confessions taken within six hours of arrest (plus any reasonable time for transportation). The question here is whether Section 3501(c) also codifies an implicit exclusionary rule for confessions taken more than six hours (plus reasonable transportation time) after arrest and before presentation to a magistrate.

3. The text of Section 3501(c) does not announce any exclusionary rule and, in particular, does not mandate the exclusion of confessions taken more than six hours after arrest based on unreasonable delay in presentation to a magistrate. That textual omission of any exclusionary rule should be the end of the matter. See *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 356 (1994) ("When interpreting a statute, we look first and foremost to its text.").[7] Just as this Court has strongly cautioned against the adoption of exclusionary rules because of their great societal costs, see, *e.g.*, *Hudson* v.

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[7] In *Alvarez-Sanchez*, this Court held that 18 U.S.C. 3501(c) "does not apply to statements made by a person who is being held solely on state charges." 511 U.S. at 352. As noted previously, petitioner was arrested as part of a joint operation by federal and state authorities whose immediate goal was to execute a state warrant for his arrest. The courts below expressly determined, however, that petitioner was "placed under federal arrest for assault on a law enforcement officer" from the beginning, J.A. 178; Pet. App. C1, and the government did not contend otherwise before the court of appeals, see Gov't C.A. Br. 8, 14-26. Accordingly, this case presents an issue the Court did not reach in *Alvarez-Sanchez*: "the effect of § 3501(c) on confessions obtained more than six hours after an arrest on federal charges." 511 U.S. at 361 (Ginsburg, J., concurring); see *id.* at 356.

Michigan, 547 U.S. 586, 591 (2006) ("Suppression of evidence * * * has always been our last resort, not our first impulse."), Congress should not be presumed to have adopted such a rule without explicitly saying so.

Petitioner nonetheless asserts (Pet. Br. 14) that the negative implication of Section 3501(c) "is that confessions made outside the six-hour time limitation set forth in § 3501(c) are inadmissible * * * if the defendant's presentment to a magistrate was unnecessarily delayed." Whatever negative implication might otherwise be drawn from Section 3501(c) standing alone, such an implication cannot be drawn where it would override the affirmative command of Section 3501(a) that all voluntary confessions "shall be admissible in evidence," 18 U.S.C. 3501(a), and the provision in Section 3501(b) that the "time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment" is a factor in the voluntariness calculus. See *United States* v. *Marrero*, 450 F.2d 373, 379 (2d Cir. 1971) (Friendly, C.J., concurring) (agreeing with the Ninth Circuit's decision in *United States* v. *Halbert*, 436 F.2d 1226, 1231-1237 (1970), which had "conclude[d] that confessions given more than six hours after arrest during a delay in arraignment are admissible if voluntary, although the trial judge * * * may take into account delay in arraignment in his determination of voluntariness" (*id.* at 1237); "we cannot say that Congress intended by the provision in subsection 3501(c) to undo all it had done with the preceding subsections" (*id.* at 1234)). "[N]ot every silence is pregnant" and "[a]n inference drawn from" what Congress did not say in Section 3501(c) "cannot be credited when it is contrary to" the text of a different provision of the

same statute. *Burns* v. *United States*, 501 U.S. 129, 136 (1991) (first brackets in original) (citation omitted).

The error in construing Section 3501(c) to exclude evidence by negative implication is revealed by the untenable consequences of a consistent application of a negative-implication principle to that subsection. Section 3501(c) permits only one form of delay to exceed the six hours provided under its safe-harbor provision for admissibility: delay found "to be reasonable considering the means of transportation and the distance to be traveled to the nearest available * * * magistrate judge or other officer." A logical and consistent application of the "negative implication" canon would mean that Section 3501(c) would provide that all confessions made more than six hours after arrest but before presentment "shall * * * be inadmissible solely because of delay" *unless* the case falls within the travel-related exception set forth in Section 3501(c)'s "[p]rovided" clause. 18 U.S.C. 3501(c). See NACDL Amicus Br. 3 (suggesting that Section 3501(c) renders inadmissible any confession obtained more than six hours after arrest "unless specific, congressionally-sanctioned exceptions are met").

Petitioner does not advocate such an approach, however, and the reason is immediately apparent: it would lead to nonsensical results. Suppose that a delay in presentment were occasioned by the complete unavailability of a judge in the middle of the night, serious injuries to the arrestee or to the arresting officer that demanded immediate medical attention, or the unavailability of a magistrate because of more pressing judicial business or because of the volume of arrestees. None of those reasons would fit textually within Section 3501(c)'s "[p]rovided" clause. That provision does not create an all-pur-

pose "reasonableness" or "necessity" exception to the six-hour period. Instead, it states that the six-hour "time limitation * * * shall not apply in any case in which the delay" in presentment is "reasonable *considering the means of transportation and the distance to be traveled to* the nearest available" judicial officer. 18 U.S.C. 3501(c) (emphasis added). According to a negative-implication approach to statutory interpretation, therefore, no other reason would be acceptable.

Rather than advocate for a logical, consistent, but inherently problematic, application of negative-implication principles to Section 3501(c), petitioner instead argues (Pet. Br. 60) that courts should exclude confessions only where the delay in presentment beyond six hours was "unreasonable and unnecessary" in a broader sense.[8] That approach, however suffers from at least two significant problems. First, it arbitrarily applies a negative-implication analysis to exclude some confessions resulting from delayed presentment, but then changes course and refuses to give effect to a negative implication when it produces patently unreasonable results. Second, it creates an interpretive problem for courts seeking to determine which forms of delay not enumerated by Congress constitute reasonable and permissible purposes for delay. Once courts choose to go beyond the "[p]rovided" clause, they have nothing but judge-made principles for deciding what forms of delay

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[8] This is also the position urged by the dissenting judge below, see J.A. 234-237 (Sloviter, J., dissenting), and by the majority of courts of appeals that have rejected the view that Section 3501 makes voluntariness the sole non-constitutional test governing the admissibility of a confession. See, *e.g.*, *United States* v. *Mansoori*, 304 F.3d 635, 660 (7th Cir. 2002), cert. denied, 538 U.S. 967 (2003); *United States* v. *Van Poyck*, 77 F.3d 285, 288 (9th Cir.), cert. denied, 519 U.S. 912 (1996); *United States* v. *Perez*, 733 F.2d 1026, 1035-1036 (2d Cir. 1984).

to count as reasonable. Cf. *United States* v. *Gaines*, 555 F.2d 618, 623-624 (7th Cir. 1977) (stating that a court's decision to exclude a voluntary confession under Section 3501(c) should "depend[] upon a congeries of factors, including such elements as the deterrent purpose of the exclusionary rule, the importance of judicial integrity, and the likelihood that admission of the evidence would encourage violations of the Fourth Amendment"). Congress could have included a general provision for "reasonable delay," which would have been the converse of the requirement in Federal Rule of Criminal Procedure 5 to avoid "unnecessary delay" in presentment. But Congress did not do so, and courts should not read such a requirement into Section 3501(c). In contrast, a consistent *rejection* of negative implications from Section 3501(c) leaves courts with a clear statutory rule to apply, *i.e.*, Section 3501(a)'s command to admit confessions that are voluntary.

4. Petitioner invokes "the principle that a more specific statute will be given precedence over a more general one," *Busic* v. *United States*, 446 U.S. 398, 406 (1980), and he argues that Section 3501(c) is the more specific provision on whether a voluntary confession may be excluded based solely on a delay in presentment. As petitioner acknowledges, however, that interpretive principle applies only "[w]here there is 'inescapable conflict between general and specific terms or provisions of a statute.'" Pet. Br. 31 (quoting 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 46:5, at 224 (rev. 7th ed. 2008)); accord *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973) (applying canon where the more specific statute "explicitly" addressed the manner in which a state prisoner would be permitted to attack his confinement in federal court).

Here, there is no conflict at all, much less an "inescapable" one between the texts of Section 3501(a) and Section 3501(c). Section 3501(a) mandates the admission of voluntary confessions, and Section 3501(c) provides a safe harbor that prohibits the exclusion of voluntary confessions solely on the basis of a delay in presentment up to six hours following arrest. Those provisions do not produce divergent outcomes as applied to any fact patterns.

5. Petitioner thus contends (Pet. Br. 29) that Section 3501(a) cannot mean what it says because that would "render[] subsection (c) entirely superfluous." Even if a straightforward reading of Section 3501 generated surplusage—and, as explained next, it does not—petitioner's argument should still be rejected. "Surplusage does not always produce ambiguity," *Lamie* v. *United States Tr.*, 540 U.S. 526, 536 (2004), and "[i]t is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction," *United States* v. *Atlantic Research Corp.*, 127 S. Ct. 2331, 2337 (2007). Section 3501(a) clearly provides that all "voluntarily given" confessions "shall be admissible," and the Court could not adopt petitioner's proposed interpretation of Section 3501(c) without carving a sizeable—and wholly atextual—exception out of Section 3501(a).

Petitioner asserts (Pet. Br. 29-30) that "[i]f voluntariness were the sole criterion of admissibility, it would make no difference whether a confession was given before or after the six-hour time period expired." But the six-hour provision is a safe harbor. The role of a safe-harbor provision—here as elsewhere in the law—is not to change the legal principles that generally govern a claim, but to provide certainty with respect to specific recurring factual situations. Congress has provided

that, as a statutory matter, the sole test for the admissibility of confessions is voluntariness. 18 U.S.C. 3501(a). Congress has also provided that, in assessing voluntariness, a court should consider a variety of factors, including a delay in presentment. 18 U.S.C. 3501(b). But in Section 3501(c) Congress has also provided that courts may not rely *exclusively* on a delay in presentment in excluding confessions when the delay was less than six hours or was attributable to reasonable delays in transportation. 18 U.S.C. 3501(c). In contrast, when a delay in presentment extends beyond the safe-harbor period, Congress has not disturbed a court's ability to find a confession involuntary based on the extent of delay alone in situations where the delay was extraordinarily long or oppressive.

Petitioner contends that the argument set forth in the previous paragraph solves the surplusage problem only by "rewriting" Section 3501(c) to include the word "otherwise" before "voluntary" and substituting the word "involuntary" for "inadmissible." Pet. Br. 33-34. But the word "inadmissible" is virtually synonymous with "involuntary" in this statutory context, because Section 3501(a) already lays down the rule that "voluntary" confessions are "admissible."[9] And the word "otherwise" is implicit in the statute because Section 3501(b) already made delay in presentment a factor in the voluntariness analysis. The effect of Section 3501(c), therefore, is to clarify the application of Section 3501 in one particular circumstance and preclude a finding of inad-

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[9] Section 3501 does not override other constitutional doctrines that might preclude admissibility, as petitioner notes (Pet. Br. 33 n.7). But as a matter of statutory construction, Congress's sole criteria for admissibility was voluntariness. See note 4, *supra*.

missibility (*i.e.*, involuntariness) based solely on a period of delay less than six hours.

It is no objection to that analysis that Section 3501(c) also requires that the trial judge determine that the confession was "made voluntarily" (voluntariness requirement) and that the judge leave "the weight to be given to the confession * * * to the jury" (jury-consideration requirement). 18 U.S.C. 3501(c). Although the voluntariness and jury-consideration requirements are also set forth in Section 3501(a), that fact undermines, rather than supports, petitioner's position. Section 3501(a) does not on its face make any confession inadmissible. Instead, it provides that a confession "shall be *admissible*" so long as the voluntariness and jury-consideration requirements are satisfied. 18 U.S.C. 3501(a) (emphasis added). Accordingly, the repetition of the voluntariness and jury-consideration requirements in Section 3501(c) is necessary in order to eliminate any possible suggestion that Section 3501(c) requires the admission of *any* confession that was made less than six hours after an arrest, regardless of whether that confession was voluntary or if the judge leaves the weight to be assigned to such a confession to the jury.[10]

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[10] Petitioner does not seek to draw support from Section 3501(d), which states that "[n]othing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention." 18 U.S.C. 3501(d). Subsection (d) does not exclude any evidence, but merely reinforces that Section 3501 does *not* bar confessions given outside of the context of custodial interrogation. Congress's decision to underscore the inclusionary focus of Section 3501 cannot be taken as a tacit understanding that the provision contains an unstated exclusionary rule. That is particularly true since Section 3501(d) was part of the original version of Section 3501, before

Finally, even if the Court were to conclude that the most natural reading of Sections 3501(a) and 3501(c) generates some degree of surplusage, there is no rule against Congress providing more detail as to the application of a general rule in a particular situation to ensure that its intent is clear. In any event, the interpretation proposed by petitioner fares no better. According to petitioner, Sections 3501(a) and (b) address situations in which confessions are inadmissible on the ground that they are involuntary, whereas Section 3501(c) addresses situations in which "*voluntary* confessions taken outside the six-hour time limitation" may be excluded solely as a consequence of the delay in presentment. Pet. Br. 37; see *id.* at 52-53. If that argument were correct, however, there would be no explanation for Congress's decision to repeat the voluntariness and jury-consideration requirements in Section 3501(c): on petitioner's view, if the trial judge concluded that a confession was involuntary or failed to permit the jury to decide how much weight to give it, the confession would be inadmissible under Section 3501(a) and there would be no need to consider Section 3501(c) at all. For that reason as well, the presumption against surplusage cannot warrant carving out a completely atextual exception from Section 3501(a).[11]

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it contained the six-hour provision on which petitioner relies in arguing that Congress intended to exclude confessions made outside of that safe-harbor period. See S. Rep. No. 1097, 90th Cong., 2d Sess. 9 (1968).

[11] The respondent in *Alvarez-Sanchez* argued that it was necessary for courts to recognize at least one exception to the literal language of Section 3501(a) on the theory that the statute would otherwise mandate admission of confessions even when the court concluded that they were irrelevant. 3/1/94 Tr. Oral Arg. 23-24, *Alvarez-Sanchez*, *supra*. But Section 3501(a) applies only in "criminal prosecution[s] brought by the United States or by the District of Columbia," 18 U.S.C. 3501(a), and a

B. Because Section 3501 Did Not Mandate Exclusion Of Petitioner's Voluntary Confessions, Federal Rule Of Evidence 402 Required Their Admission

If Section 3501 is construed correctly, the statute contains no exclusionary rule for a delay in presentment standing alone, and it mandates the admission of voluntary confessions. See pp. 13-25, *supra*. Petitioner also seems to argue, however, that his confessions were inadmissible because Section 3501 "limits but does not entirely abrogate" (Pet. Br. 24 (emphasis omitted)) the exclusionary rule created by *McNabb* and *Mallory*. Under that view, even if Section 3501(c) did not "codify" the *McNabb-Mallory* rule, it left that supervisory-powers rule intact for confessions taken after six hours of delay in presentment. That contention is without merit.

1. "Before the [Federal Rules of Evidence] were promulgated, the admissibility of evidence in the federal courts was governed in part by statutes or Rules, and in part by case law." *United States* v. *Abel*, 469 U.S. 45, 50 (1984). In *Funk* v. *United States*, 290 U.S. 371 (1933), for example, this Court departed from "[t]he rule of the common law which denies the competency of one spouse to testify in behalf of the other in a criminal prosecution." *Id.* at 382. In so doing, the Court affirmed its power to craft rules governing the admissibility of evidence in federal court "in the complete absence of congressional legislation on the subject." *Id.* at 383.

"confession" in that context is naturally understood as referring to a confession that is incriminating on the offense charged. The definition of "confession" in 18 U.S.C. 3501(e) as a "confession of guilt of any criminal offense or * * * self-incriminating statement," 18 U.S.C. 3501(e), makes clear that it covers incriminating denials or other statements as well as direct admissions of guilt.

"*Mallory* and *McNabb* plainly rest[ed] on [the Court's] supervisory authority" over the lower federal courts. *Sanchez-Llamas* v. *Oregon*, 548 U.S. 331, 346 (2006); accord *Miranda*, 384 U.S. at 463 (describing *Mallory* and *McNabb* as establishing "supervisory rules"); *United States* v. *Mitchell*, 322 U.S. 65, 66 (1944) (describing *McNabb* as "merely another expression" of the Court's practice of formulating common law rules of evidence). It is thus clear that the *McNabb-Mallory* rule is a non-constitutional "judicially created federal rule of evidence." *United States* v. *Carignan*, 342 U.S. 36, 41 (1951).

This Court's "power * * * to prescribe rules of procedure and evidence for the federal courts," including its ability to formulate and apply the exclusionary rule associated with *McNabb* and *Mallory*, "exists only in the absence of a relevant Act of Congress." *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959); accord *Dickerson*, 530 U.S. at 437 (stating that "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution").

In *Bank of Nova Scotia*, for example, this Court held that "a federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a)." 487 U.S. at 254. In that case, a district court had "dismiss[ed] an indictment for prosecutorial misconduct in a grand jury investigation." *Id.* at 252. The Court explained that "Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress," and it stated that "[t]he balance struck by the Rule between societal costs and the rights of the accused may not casually be overlooked." *Id.* at 255; accord *Johnson* v. *United States*,

520 U.S. 461, 466 (1997) (stating that this Court "ha[d] no authority to make" an exception to the standards prescribed by Federal Rules of Criminal Procedure 52(b) for granting relief on a forfeited claim); *Carlisle* v. *United States*, 517 U.S. 416, 433 (1996) (holding that a district court "had no authority to grant" a motion for a judgment of acquittal that was filed outside the time limit prescribed by Federal Rule of Criminal Procedure 29(c)).

The Court has followed the same approach when a rule or doctrine originating in the Court's supervisory authority conflicts with the Federal Rules of Evidence, which were enacted by Congress in 1975, see Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926. In *Bourjaily* v. *United States*, 483 U.S. 171 (1987), this Court considered the "bootstrapping" rule associated with *Glasser* v. *United States*, 315 U.S. 60 (1942), and *United States* v. *Nixon*, 418 U.S. 683 (1974). The petitioner in *Bourjaily* argued that, because the bootstrapping rule had been "embedded in the previous approach," the Court "should not find that Congress altered the rule without affirmative evidence so indicating." *Bourjaily*, 483 U.S. at 178. The Court rejected that contention. The Court noted that "Rule 104, on its face, appear[ed] to allow the court to make [certain] preliminary factual determinations" without regard to any bootstrapping rule, and it stated that "[i]t would be extraordinary to require legislative history to *confirm* the plain meaning of" the relevant rule. *Ibid.*; accord *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993) (concluding that the rule of *Frye* v. *United States*, 293 F. 1013 (D.C. Cir. 1923), "was

superseded by the adoption of the Federal Rules of Evidence").[12]

2. The same analysis the Court applied in *Bank of Nova Scotia*, *Carlisle*, *Johnson*, *Bourjaily*, and *Daubert* governs here. "[T]he Federal Rules of Evidence are a legislative enactment." *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 163 (1988). As a result, those Rules are as binding, and the Court interprets them, "as [it] would any statute." *Daubert*, 509 U.S. at 587.

Federal Rule of Evidence 402 establishes the general principle that "[a]ll relevant evidence is admissible." That same Rule also makes clear that any "except[ions]" must be "provided by" one of four sources: "the Constitution of the United States," an "Act of Congress," "these rules," or "other rules prescribed by the Supreme Court pursuant to statutory authority." Fed. R. Evid. 402. Exclusion of otherwise relevant evidence pursuant to the "judicially created federal rule of evidence" (*Carignan*, 342 U.S. at 41) that this Court created in *McNabb* and applied in *Mallory* would "effectively annul[]" the limits Congress has placed on the circumstances in which relevant evidence may be excluded (*Carlisle*, 517 U.S. at 426) and "confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing." *United*

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[12] In *Abel*, in contrast, the Court concluded that the common law rule permitting impeachment for bias was "entirely consistent with Rule 402's general requirement of admissibility" and it determined that it was "unlikely that the drafters [of the Federal Rules of Evidence] had intended to change the rule." *Daubert*, 509 U.S. at 588; accord *Abel*, 469 U.S. at 51 (explaining that "[a] successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony" and would thus constitute "relevant evidence" under Federal Rule of Evidence 401).

States v. *Payner*, 447 U.S. 727, 737 (1980). Because federal courts have "no authority to make" (*Johnson*, 520 U.S. at 466) such an exception to Federal Rule of Evidence 402, that Rule eliminates *McNabb-Mallory* as an evidentiary doctrine, even if it is assumed that Section 3501(c) implicitly left that doctrine standing for confessions taken outside of the six-hour period of delay.

C. Section 3501's Legislative History Does Not Warrant A Different Result

1. As the previous sections explained, an examination of the full text of 18 U.S.C. 3501 and Federal Rule of Evidence 402 makes clear that both provisions independently mandated the admission into evidence of petitioner's voluntary confessions, made after a valid waiver of his *Miranda* rights. Legislative history, therefore, need not be considered in order to resolve this case. See, *e.g.*, *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291 (2006) ("When the statutory language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.") (internal quotation marks and citation omitted); *Whitfield* v. *United States*, 543 U.S. 209, 215 (2005) (no need to consider legislative history where "the meaning of [the statutory] text is plain and unambiguous"); *Lamie*, 540 U.S. at 536 ("We should prefer the plain meaning since that approach respects the words of Congress" and "avoid[s] the pitfalls that plague too quick a turn to the more controversial realm of legislative history."); *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").

2. In any event, Section 3501's legislative history further refutes petitioner's contention that the statute

by its own force mandates the suppression of any voluntary confessions.

Section 3501 was enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 701, 82 Stat. 210. The initial version of the legislation that passed the House (H.R. 5037, 90th Cong., 1st Sess. (1967)) contained no provision governing the admissibility of confessions, and the initial House debate did not address the subject. See 113 Cong. Rec. 21,812-21,861 (1967).

Section 3501 was added to the bill by the Senate Judiciary Committee, which also added provisions about the admissibility of eyewitness testimony. See S. Rep. No. 1097, 90th Cong., 2d Sess. 10 (1968) (*Senate Report*). As in the final legislation, the version of Section 3501(a) that was reported out of committee provided that "a confession * * * shall be admissible in evidence if it is voluntarily given," with the remainder of Section 3501(a) and 3501(b) providing procedures for trial courts to follow in making that determination. *Senate Report* 9. Section 3501(c) proscribed delay in presentment as a basis for suppression. Unlike the final legislation, however, the original version of Section 3501(c) did not contain any reference to how long after a defendant's arrest a confession was obtained. Instead, it provided that a confession "shall not be inadmissible solely because of delay" in presentment "if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury." *Ibid.*

The form in which Section 3501 emerged from the Senate Judiciary Committee is telling for two reasons. First, it is clear that the original purpose of the bill was to eliminate the *McNabb-Mallory* rule entirely rather

than to codify any portion of that rule. Second, to the extent the Court finds any tension or redundancy between Congress's statement in Section 3501(c) that a confession "shall not be inadmissible solely because of delay" and its direction in Section 3501(a) that all voluntary confessions "shall be admissible," those issues characterized the statute long before the addition of the six-hour safe-harbor period upon which petitioner relies.

The *Senate Report* confirms that Section 701 of the proposed legislation, which included all of what became Section 3501, was designed "to offset the harmful effects of the *Mallory* case." *Senate Report* 38; see *id.* at 41-51 (discussing *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda*, *supra*). The *Senate Report* explained that there was "no constitutional bar to congressional abrogation of the *Mallory* rule," noting that because that rule "[was] not based on any constitutional principle, it c[ould] be changed by legislation." *Id.* at 40 (citation omitted). The *Senate Report* further explained that "[e]nactment of the provisions of subsections 3501 and 3502 would assign proper weight to the *Mallory* rule," and create a regime under which "[d]elay in bringing a suspect before a committing magistrate would be a factor to consider in determining the issue of voluntariness, but it would not be the sole criterion to be considered—operating to automatically exclude an otherwise competent confession." *Id.* at 40-41.

The record of the initial Senate debate on Section 3501 confirms that its supporters and opponents understood that the statute would do away with the judge-made rule embodied in the *McNabb-Mallory* line of cases. Senator Thurmond, who supported the legislation, stated that the bill "would restore the test for admissibility of confessions in criminal cases to that time-tested

and well-founded standard of voluntariness" and would "set aside the inflexible and technical rules established in" *Mallory*, *Escobedo*, and *Miranda*. 114 Cong. Rec. 11,612 (1968); accord *id.* at 11,201-11,202 (remarks of Sen. McClellan). Senator Stennis stated that Section 3501(c) would "counteract the so-called Mallory rule, and put an end to the practice of discarding voluntary confessions of guilt because the police officers were not hasty enough in getting the defendant before a committing magistrate." *Id.* at 14,016. Senator Stennis further explained that, under the proposed legislation, "[d]elay in taking the defendant before a commissioner would continue to be a factor in determining whether his confession was voluntarily given but it would no longer be the overriding issue." *Ibid.* Senators who opposed the legislation stated that it would effect "[t]he outright repeal of Mallory,"[13] "revers[e]" *Mallory*,[14] and "overrule" that decision.[15]

3. Petitioner acknowledges that, "[a]s originally proposed" by the Senate Judiciary Committee, Section 3501 "sought to abrogate the *McNabb-Mallory* rule entirely." Pet. Br. 39. Petitioner asserts (*ibid.*), however, that a floor amendment proposed by Senator Scott and adopted by the Senate before the bill was returned to the House of Representatives was part of a "compromise" whose purpose was to "partially codify and partially abrogate" the *McNabb-Mallory* rule.

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[13] 114 Cong. Rec. at 14,136 (remarks of Sen. Fong); accord *id.* at 14,158 (remarks of Sen. Hart).

[14] 114 Cong. Rec. at 12,924 (remarks of Sen. Young).

[15] 114 Cong. Reg. at 11,594 (remarks of Sen. Morse); *id.* at 11,891 (remarks of Sen. Tydings), *id.* at 14,167 (remarks of Sen. McIntyre); *id.* at 11,234 (remarks of Sen. Tydings); *id.* at 11,745 (remarks of Sen. Brooke); *id.* at 12,292 (remarks of Sen. Fong).

Even if petitioner's interpretation of the legislative events was unambiguously correct (and it is not), it would still not justify departing from the clear language that Congress actually enacted. "Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Petitioner does not identify any "ambiguous terms" upon which his assertions of legislative horse-trading (Pet. Br. 46-50) or conscious vote-structuring (*id.* at 52-55) could potentially shed light.

At any rate, petitioner's interpretation of the Scott amendment is also incorrect. To begin, petitioner's view is inconsistent with Senator Scott's description of his own proposal as a "very simple amendment" to which he had "heard of no objection." 114 Cong. Rec. at 14,184. These descriptions indicate that Senator Scott did not perceive the change he was proposing as one that would alter the essential character of the bill. To the contrary, Senator Scott explained that his proposal was intended to forestall a constitutional attack on Section 3501(c), because, in his view, the statute would be of "doubtful validity" if it were applied to forbid suppression of a confession obtained after "a 36- or a 24-hour interrogation." *Id.* at 14,186. In contrast, petitioner views the Scott amendment as having codified in part one of the very decisions (*Mallory*) that voluminous and far clearer indicators of legislative meaning demonstrate that Congress intended to overturn by enacting Section 3501.[16]

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[16] Petitioner is correct that Senator Scott also stated that his amendment "provide[d] that the period during which confessions may be received or interrogations may continue, which may or may not result in a confession, shall in no case exceed 6 hours." 114 Cong. Rec. at

Petitioner's arguments (Pet. Br. 45-50) based on the D.C. Crime Act are similarly flawed. Even if petitioner is correct that at least some Senators understood the Scott amendment to mirror the approach taken in that earlier legislation, that fact would still not clearly indicate that Section 3501(c) mandates the suppression of any voluntary confession. In Section 301(b) of the D.C. Crime Act, Congress provided that "[a]ny statement, admission, or confession made by an arrested person within three hours immediately following his arrest shall not be excluded from evidence * * * solely because of delay in presentment." Act of Dec. 27, 1967, Pub. L. No. 90-226, § 301(b), 81 Stat. 735-736. Like Section 3501(c), however, this language states only that certain confessions (those obtained within three hours of arrest) shall not be excluded on certain grounds (delay alone); it does not state that all—or any—other confessions may or must be excluded based on delay alone. In order to make his "compromise" argument work, therefore, petitioner must argue that the legislative history of a different piece of legislation (the D.C. Crime Act) indicates that that legislation means something that its own text does not say and then further argue that the legislative history of the Scott amendment indicates that Section 3501 should be construed in a similar, and similarly atextual, fashion. That highly attenuated use of legislative history is unfounded.

14,184. But that comment has no basis in the statutory text. Section 3501 establishes rules about the admissibility of certain confessions in court; nothing in the statute forbids police officers from questioning a suspect who has been detained for more than six hours but has not yet been presented to a magistrate, and nothing in the statute explicitly excludes any confession.

Petitioner's argument about the way in which the Scott amendment was modified before its ultimate incorporation into the legislation on the Senate floor (Pet. Br. 55-56) undermines, rather than supports, his position. As petitioner observes, Senator Scott's original proposal would have stricken the voluntariness and jury-consideration requirements from Section 3501(c) and replaced them with language focused exclusively on the amount of time between arrest and confession. See 114 Cong. Rec. at 14,184. Senator McClellan suggested retaining the voluntariness and jury-consideration requirements in Section 3501(c) as well, Senator Scott agreed to that proposal, and the amendment was modified in the manner proposed by Senator McClellan. *Id.* at 14,184-14,185.

Petitioner asserts (Pet. Br. 56) that this sequence of events demonstrates that "subsections (a) and (b) were intended to operate independently of subsection (c), and that the *McNabb-Mallory* rule is addressed by subsection (c) alone." But there is a more straightforward explanation for Senator McClellan's proposal—one far more consistent with what Senator McClellan actually said in making it. Neither Section 3501(a) nor Section 3501(c) expressly directs the exclusion of any confession. See p. 24, *supra*. As a result, a failure to reiterate the voluntariness and jury-consideration requirements in Section 3501(c) would have resulted in a statute that could most naturally have been read to authorize the admission of any confession—whether voluntary or not —so long as it was obtained within six hours of arrest. And that is the precise concern that Senator McClellan expressed in justifying his proposal to revise the language of the Scott amendment. See 114 Cong. Rec. at 14,184 (stating that "[i]f the judge finds [a confession]

was not voluntary, no matter if [the defendant] was in custody for only 30 minutes, the confession should not be admitted").

Petitioner's contention that the Scott amendment codified *Mallory* with respect to confessions obtained more than six hours after a defendant's arrest on federal charges is further undermined by what transpired in the House of Representatives after the revised legislation passed the Senate. During the final floor debate, the sponsor of the earlier House version of the bill stated that the final, post-Scott amendment, version of Section 3501 "turn[ed] the clock backward to the day before *Mallory* * * * and ma[de] 'voluntariness' the sole test as to the validity of a confession." 114 Cong. Rec. at 16,066 (remarks of Rep. Celler). Other representatives agreed with that description of the effect of Section 3501, and they specifically adverted to the demise of the *Mallory* rule. See *id.* at 16,273 (remarks of Rep. Rogers) ("Adoption of this change * * * would assign proper weight to the [*Mallory*] rule. Delay in bringing a suspect before a committing magistrate would be a factor to consider in determining the issue of voluntariness, but it would not be the sole criterion to be considered."); *id.* at 16,275 (remarks of Rep. McGregor) ("Section 3501(c) overrules the Mallory decision"); *id.* at 16,276 (remarks of Rep. Anderson) ("Section 3501(c) does overrule the Mallory decision."); *id.* at 16,295 (remarks of Rep. Reid) (stating that bill "would reverse" *Mallory*); see also *id.* at 16,285 (remarks of Rep. Machen) (stating that the title of the legislation that included Section 3501 would "mak[e] a confession admissible as

evidence if the trial judge finds it was given voluntarily").[17]

D. The Canon Of Constitutional Avoidance Does Not Apply

Petitioner briefly argues (Pet. Br. 35-36) that the interpretation of Section 3501 adopted by the court of appeals "should be rejected as constitutionally doubtful." Pet. Br. 35. That contention is without merit.

1. The canon of constitutional avoidance "is * * * a means of giving effect to congressional intent, not of subverting it," and it is properly invoked only where a court must "choos[e] between competing plausible interpretations of a statutory text." *Clark* v. *Martinez*, 543 U.S. 371, 380-382 (2005). Here, for the reasons explained above, the statutory text cannot be plausibly interpreted to mandate exclusion of voluntary confessions based solely on more than six hours of delay in presentment.

2. In any event, petitioner has also failed to identify any "serious constitutional doubts," *Clark*, 543 U.S. at 381, that would be raised by construing Section 3501 in accordance with its text. Petitioner is correct (Pet. Br. 36) that "Congress * * * can neither direct the courts

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[17] A bill analysis prepared by the Library of Congress' Legislative Reference Service and placed in the *Congressional Record* by Representative Cellar describes Section 3501(c) as providing a six-hour "time limit * * * during which interrogation may take place." 114 Cong. Rec. at 16,068. That same bill analysis, however, also states that Section 3501(c) "is obviously intended to repeal the decision of the Supreme Court in *Mallory* v. *United States*, 354 U.S. 449 (1957))." *Ibid.* At any rate, the first statement quoted above at most evidences an understanding—which is consistent with the creation of the safe-harbor period—that delays for interrogation should not last more than six hours. It does not speak at all, however, to what, if any, consequences a longer delay would have with respect to the admissibility of any confession obtained during the post-six-hour period.

to admit confessions the courts find to be involuntary, nor accomplish the same thing by narrowing the factual grounds for determining involuntariness." But to the extent that petitioner suggests that the statute, read as the court below interpreted it, would preclude a finding of involuntariness based *solely* on delay in presentment of less than six hours, no serious constitutional questions are raised. This Court has explained that the overriding inquiry with respect to the constitutional voluntariness analysis is "'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession." *Dickerson*, 530 U.S. at 434 (quoting *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973)). That analysis, in turn, requires "consideration [of] 'the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.'" *Ibid.* (quoting *Schneckloth*, 412 U.S. at 226).

Petitioner does not assert that a confession made less than six hours after a defendant's arrest could ever be deemed involuntary in a constitutional sense based "solely" on the fact of the delay in presentment. Thus, to the extent that 18 U.S.C. 3501(c) would preclude such a determination, it conforms to constitutional norms and raises no serious constitutional issues. Section 3501(b), in turn, provides that courts should in all cases consider the existence and extent of any delay in presentment as a factor in assessing the voluntariness of a confession. Thus, even a delay of less than six hours, in combination with other circumstances could render a confession involuntary. Because petitioner has not and cannot identify any situation in which this regime would raise any serious constitutional concerns, the canon of constitutional avoidance cannot justify creating an exclusionary

rule that is nowhere stated in the statute's text and that would be inconsistent with Section 3501(a).

E. Petitioner's Policy Arguments Do Not Warrant A Different Result

Petitioner contends (Pet. Br. 57) that "interpreting § 3501(c) so as to retain a modified *McNabb-Mallory* rule w[ould] be beneficial for law enforcement and the courts." Petitioner's policy argument provides no basis for overriding the statute's text and reversing the court of appeals' judgment in this case. In any event, petitioner has the policy interests backwards.

1. As in any case involving statutory interpretation, this Court's duty is "to construe what Congress has written," *Board of Educ.* v. *Rowley*, 458 U.S. 176, 191 n.11 (1982), rather than to devise its own scheme for dealing with matters that Congress has already addressed. And for the reasons stated above, Section 3501 and Federal Rule of Evidence 402 both mandated the admission of petitioner's voluntary confessions in this case and no statute or other provision of law required their exclusion.

2. At any rate, petitioner's policy arguments are entirely unfounded. This Court has acknowledged "society's compelling interest in finding, convicting, and punishing those who violate the law," *Moran* v. *Burbine*, 475 U.S. 412, 426 (1986), and it has emphasized that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good," *McNeil* v. *Wisconsin*, 501 U.S. 171, 181 (1991). The Court has recently emphasized the "substantial social costs" of exclusionary rules. *Hudson*, 547 U.S. at 591; see *ibid.* (the Court has "repeatedly emphasized that the [exclusionary] rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its]

application" (brackets in original) (citation omitted)). As a result, "society would be the loser" if this Court required the suppression of petitioner's voluntary confessions as a remedy for any delay in presenting petitioner to a magistrate. *McNeil*, 501 U.S. at 181.

Against those high costs to the truth-seeking function, petitioner has failed to demonstrate that that adoption of his proposed rule would produce more than "insignificant advantages." *McNeil*, 501 U.S. at 180. Federal Rule of Criminal Procedure 5(a)(1)(A) already provides that a law enforcement officer who makes an arrest on federal charges "*must* take the defendant without unnecessary delay before a magistrate judge" or other appropriate judicial officer. (emphasis added). There is no "demonstrated pattern of * * * violations" of that command. *Hudson*, 547 U.S. at 604 (Kennedy, J., concurring in part and concurring in the judgment). To the contrary, the government is aware of only a handful of post-*Alvarez-Sanchez* decisions in which courts that apply the rule petitioner advocates have suppressed voluntary confessions based on an unreasonable delay in presentment, see Br. in Opp. 16-17, and petitioner has not cited any others. If greater concerns were to arise in the future, Congress or the relevant rules committee would be well-equipped to investigate the extent and causes of any problems and to determine whether suppression of voluntary confessions would be an appropriate response. Cf. *Hudson*, 547 U.S. at 603 (Kennedy, J., concurring in part and concurring in the judgment).[18]

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[18] Petitioner does not assert that Rule 5(a)(1)(A) itself required suppression of his voluntary confessions, and it does not in any event. That Rule does not "prescribe specific remedies for violations of" its command, *Sanchez-Llamas*, 548 U.S. at 343, and "[t]here is no presumption or general rule that for every duty imposed" upon law enforcement

But there is certainly no basis to "*assume* that exclusion in this context is necessary deterrence." *Hudson*, 547 U.S. at 597 (emphasis added).

Not only has petitioner failed to assert, much less demonstrate, any pattern of violations of Federal Rule of Criminal Procedure 5(a)(1)(A), he has also failed to demonstrate that his proposed approach would significantly increase officers' existing incentives to comply with that Rule. The courts of appeals that have correctly held that Section 3501 does not permit suppression of a voluntary confession made outside the six-hour safe-harbor period have nonetheless recognized that a

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"there must exist some corollary punitive sanction for departures or omissions," *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717 (1990). The issue, instead, is whether anything in Criminal Rule 5 "otherwise provide[s]" (Fed. R. Evid. 402) that a court should suppress highly relevant evidence in order to punish the government for unwarranted presentment delay. And as this Court has recognized, the answer is "no." See *McNabb*, 318 U.S. at 345 (acknowledging that an earlier statute—of which Rule 5(a)(1)(A) "is a compendious restatement, without substantive change," *Mallory*, 354 U.S. at 452—did not by its own force "forbid[] the use of evidence" acquired after a period of unreasonable presentment delay).

The Advisory Committee's Note on the proposed 1972 version of Federal Rule of Evidence 402 cited this Court's decision in *Mallory* for the proposition that "effective enforcement of the command, originally statutory and now found in Rule 5(a) of the Rules of Criminal Procedure * * * is held to require the exclusion of statements elicited during detention in violation thereof." Although "the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule," *United States* v. *Vonn*, 535 U.S. 55, 64 n.6 (2002), the statement quoted above does not purport to be an interpretation of Federal Rule of Evidence 402 itself, nor does it purport to interpret Federal Rule of Criminal Procedure 5. It simply restates the conclusion of this Court in *Mallory*. And neither the text nor the Advisory Committee's Notes to Criminal Rule 5(a)(1) indicates that the Rule mandates the exclusion of confessions obtained as a consequence of its violation.

delay in presentment is a factor that should be considered in assessing voluntariness. See J.A. 189-192; *United States* v. *Glover*, 104 F.3d 1570, 1583 (10th Cir. 1997); *United States* v. *Christopher*, 956 F.2d 536, 538 (6th Cir. 1991), cert. denied, 505 U.S. 1027 (1992). As a result, the rule advocated by petitioner will affect the outcome only in that category of cases where: (i) the defendant is arrested on federal charges but is not taken before a magistrate within six hours of arrest; (ii) the delay in presentment beyond six hours is not reasonable; (iii) the defendant confesses during the period beyond six hours in which presentment was unreasonably delayed; (iv) the confession is not inadmissible under *Miranda* or the Fourth Amendment exclusionary rule; and (v) neither the delay alone nor the delay in conjunction with any other relevant factor renders the confession involuntary under the standards set forth in Section 3501(b). It would appear that not many such cases exist.[19]

3. Even if petitioner's proposed rule would deter a meaningful number of violations of Federal Rule of Criminal Procedure 5(a), suppression of voluntary confessions would still be an unwarranted response. The Court has "applied the exclusionary rule primarily to deter constitutional violations." *Sanchez-Llamas*, 548 U.S. at 348. Here, in contrast, any possible violation was purely non-constitutional in nature and Congress

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[19] Petitioner also suggests (Pet. Br. 57) that law enforcement officers require an incentive to comply with what he describes as "§ 3501(c)'s six-hour limitation." As explained previously, however, see note 16, *supra*, the "time limitation" mentioned in Section 3501(c) is not a limitation on the period during which a pre-presentment interrogation may last. Instead, it is a limitation on the period in which a delay in presentment may not serve as the sole basis for excluding a confession.

has not provided that suppression is an appropriate remedy. Cf. *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 721 (1990) ("We do not agree that we should, or can, invent a remedy to satisfy some perceived need to coerce the courts and the Government into complying with the statutory time limits.").

In *Sanchez-Llamas*, the Court described its decision in *McNabb* as having been based in part on the fact that "the excluded evidence arose directly out of statutory violations that implicated important * * * Fifth Amendment interests." 548 U.S. at 348. Regardless of whether the balance that the Court struck in *McNabb* was appropriate as an initial matter, but see note 5, *supra*, other legal rules that have developed since then provide significant protection against the abuses at which *McNabb* and *Mallory* were originally aimed. Cf. *Texas* v. *Cobb*, 532 U.S. 162, 171 n.2 (2001) (emphasizing the need to avoid "giv[ing] short shrift to the Fifth Amendment's role (as expressed in *Miranda* and *Dickerson*) in protecting a defendant's right to consult with counsel before talking to police"). In light of those post-*McNabb* and post-*Mallory* developments, the balance of interests now tips decisively against suppression.

The defendants in *McNabb* and *Mallory* were never told that they were entitled to the assistance of counsel, see *McNabb*, 318 U.S. at 335; *Mallory*, 354 U.S. at 455, and the defendant in *Mallory* was not "warned that he might keep silent and 'that any statement made by him may be used against him,'" *ibid.* In contrast, the officers in this case "scrupulously followed *Miranda*'s dictates when questioning [petitioner]." *Cobb*, 532 U.S. at 171; see J.A. 84-85, 126-128, 172-174, 177-179. Petitioner was advised "in clear and unequivocal terms that he ha[d] the right to remain silent" and that "anything said c[ould]

and w[ould] be used against [him] in court." *Miranda*, 384 U.S. at 467-469. He was also "clearly informed that he ha[d] the right to consult with a lawyer and to have the lawyer with him during [the] interrogation," *id.* at 471, and that "if he [was] indigent a lawyer [would] be appointed to represent him," *id.* at 473. Had petitioner invoked either his right to remain silent or his right to counsel at any point while speaking with the agents, this Court's decisions would have required that all questioning cease. See *id.* at 473-474; see also *Minnick* v. *Mississippi*, 498 U.S. 146, 151 (1990); *Arizona* v. *Roberson*, 486 U.S. 675, 680 (1988). In short, if petitioner "d[id] not wish to communicate with the police except through an attorney, he c[ould] simply [have told] them that when they [gave] him the *Miranda* warnings." *McNeil*, 501 U.S. at 180.

A number of courts of appeals have concluded that a defendant who was advised of and waived his *Miranda* rights is barred from raising a claim under the *McNabb-Mallory* doctrine on the theory that the *Miranda* warnings supply the words of caution that the Court found lacking in those cases.[20] Although the government agrees with that analysis, the relevant point here is more general: in light of the protections afforded by *Miranda* and other post-*McNabb* and post-*Mallory* decisions, it is unnecessary and inappropriate to have a separate, nonconstitutional, exclusionary rule whose only independent

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[20] See, *e.g.*, *United States* v. *Salamanca*, 990 F.2d 629, 633-634 (D.C. Cir.), cert. denied, 510 U.S. 928 (1993); *United States* v. *Barlow*, 693 F.2d 954, 959 (6th Cir. 1982), cert. denied, 461 U.S. 945 (1983); *United States* v. *Indian Boy X*, 565 F.2d 585, 591 (9th Cir. 1977), cert. denied, 439 U.S. 841 (1978); *Pettyjohn* v. *United States*, 419 F.2d 651, 655-656 (D.C. Cir. 1969), cert. denied, 397 U.S. 1058 (1970); *O'Neal* v. *United States*, 411 F.2d 131, 136-137 (5th Cir.), cert. denied, 396 U.S. 827 (1969).

role is to require exclusion of voluntary confessions in situations where all of the other rules have been satisfied.[21]

4. Petitioner also suggests (Pet. Br. 57) that "a bright-line rule" would be "much easier for law enforcement * * * to implement." But "the police do not need [this Court's] assistance to establish such a guideline; they are free, if they wish, to adopt [one] on their own." *McNeil*, 501 U.S. at 181-182.

In addition, it is unclear how the regime proposed by petitioner is any more of a "bright-line rule" (Pet. Br. 57) than the one established by the texts of Section 3501 and Federal Rule of Evidence 402. Under both approaches,

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[21] This case differs from *McNabb* and *Mallory* in another respect as well. In those cases, the questioning involved the crime for which the defendants had already been arrested. See *McNabb*, 318 U.S. at 333-338 (murder of a federal agent); *Mallory*, 354 U.S. 450-451 (rape). Here, the crime for which petitioner had been arrested was assaulting a federal officer on the morning of his arrest. But petitioner confessed to an entirely unrelated armed bank robbery that had occurred more than three months before the date of his arrest. J.A. 62, 75-76, 83, 94, 98-99 n.2, 116-177. Whatever the case when the police, as in *McNabb* and *Mallory*, question the defendant about the crime of arrest during an unreaasonable delay in presentment on that crime, a voluntary confession should not be suppressed as a result of an unreasonable delay in presentment when the confession involves a different crime from the one for which the defendant has been arrested. Cf. *McNeil*, 501 U.S. at 175 (holding that both the Sixth Amendment right to counsel and the prophylactic rule adopted in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), are "offense specific"). This Court's decision in *McNeil* underscores why suppression of petitioner's voluntary confessions would be a particularly unwarranted windfall in this case. Even if petitioner had been immediately presented to a magistrate—and even if he had promptly invoked his right to counsel with respect to the charge of assaulting a federal officer—law enforcement officers would still have been entitled to approach him, seek a waiver of his rights, and question him about the armed bank robbery for which he was ultimately convicted.

a delay of less than six hours in presentment will be insufficient, standing alone, to justify exclusion, but courts will be able to consider the amount of any delay in assessing whether the confession was voluntary. It would certainly be a bright-line rule to say that all confessions obtained more than six hours after a defendant's arrest must be excluded, but Section 3501(c)'s "[p]rovided" clause plainly forecloses that option. The line would still be fairly bright if any exception were strictly limited to situations where the delay in presentment was caused by difficulties associated with transporting the defendant, but petitioner does not advocate for such an untenable regime. Whatever else a test that asks whether a delay in presentment was "unreasonable or unnecessary" (Pet. Br. 28) in light of all of the relevant circumstances of a particular case may be, it is not a bright-line rule.

F. If This Court Concludes That Section 3501 Mandates Or Authorizes The Exclusion Of Certain Voluntary Confessions, It Should Remand For Further Proceedings

If this Court were to conclude that Section 3501 permits or mandates the suppression of certain voluntary confessions as a result of an unreasonable delay in presentment, the proper course would be to remand to the court of appeals for further proceedings. The government argued below "that there were reasonable grounds for each of the steps which caused delay in [petitioner's] presentment to the magistrate," Gov't C.A. Br. 14-15; see *id.* at 14-26, but the court of appeals majority did not address the issue because it concluded that Section 3501 "narrows the meaning of 'unnecessary delay' [in Federal Rule of Criminal Procedure 5(a)(1)(A)] by restricting it to delays that are part of making a defendant's statements 'involuntary,'" J.A. 190-191. Petitioner also errs (Pet. Br. 60) in contending that the court of appeals ma-

jority "agreed that [petitioner's] oral and written confessions were taken outside the six-hour time period of § 3501(c)." To the contrary, the majority stated that its interpretation of Section 3501 made it "unnecessary for [it] to address the District Court's holding that [petitioner's] oral confession should be treated as having been made within six hours of arrest." J.A. 197 n.7.

This Court generally declines to reach issues that "were not addressed by the Court of Appeals." *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Petitioner identifies no basis for making an exception here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3501 provides:

Admissibility of confessions

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate judge or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.

(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention.

(e) As used in this section, the term "confession" means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing.

2. Federal Rule of Criminal Procedure 5 provides:

Initial Appearance

(a) In General.

(1) Appearance Upon an Arrest.

(A) A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge, or before a state or local judicial officer as Rule 5(c) provides, unless a statute provides otherwise.

(B) A person making an arrest outside the United States must take the defendant without unnecessary delay before a magistrate judge, unless a statute provides otherwise.

(2) Exceptions.

(A) An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if:

(i) the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest; and

(ii) an attorney for the government moves promptly, in the district where the warrant was issued, to dismiss the complaint.

(B) If a defendant is arrested for violating probation or supervised release, Rule 32.1 applies.

(C) If a defendant is arrested for failing to appear in another district, Rule 40 applies.

(3) **Appearance Upon a Summons.** When a defendant appears in response to a summons under Rule 4, a magistrate judge must proceed under Rule 5(d) or (e), as applicable.

(b) Arrest Without a Warrant. If a defendant is arrested without a warrant, a complaint meeting Rule 4(a)'s requirement of probable cause must be promptly filed in the district where the offense was allegedly committed.

(c) Place of Initial Appearance; Transfer to Another District.

(1) Arrest in the District Where the Offense Was Allegedly Committed. If the defendant is arrested in the district where the offense was allegedly committed:

(A) the initial appearance must be in that district; and

(B) if a magistrate judge is not reasonably available, the initial appearance may be before a state or local judicial officer.

(2) Arrest in a District Other Than Where the Offense Was Allegedly Committed. If the defendant was arrested in a district other than where the offense was allegedly committed, the initial appearance must be:

(A) in the district of arrest; or

(B) in an adjacent district if:

(i) the appearance can occur more promptly there; or

(ii) the offense was allegedly committed there and the initial appearance will occur on the day of arrest.

(3) Procedures in a District Other Than Where the Offense Was Allegedly Committed. If the initial appearance occurs in a district other than where the offense was allegedly committed, the following procedures apply:

(A) the magistrate judge must inform the defendant about the provisions of Rule 20;

(B) if the defendant was arrested without a warrant, the district court where the offense was allegedly committed must first issue a warrant before the magistrate judge transfers the defendant to that district;

(C) the magistrate judge must conduct a preliminary hearing if required by Rule 5.1;

(D) the magistrate judge must transfer the defendant to the district where the offense was allegedly committed if:

(i) the government produces the warrant, a certified copy of the warrant, or a reliable electronic form of either; and

(ii) the judge finds that the defendant is the same person named in the indictment, information, or warrant; and

(E) when a defendant is transferred and discharged, the clerk must promptly transmit the papers and any bail to the clerk in the district where the offense was allegedly committed.

(d) Procedure in a Felony Case.

(1) Advice. If the defendant is charged with a felony, the judge must inform the defendant of the following:

(A) the complaint against the defendant, and any affidavit filed with it;

(B) the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel;

(C) the circumstances, if any, under which the defendant may secure pretrial release;

(D) any right to a preliminary hearing; and

(E) the defendant's right not to make a statement, and that any statement made may be used against the defendant.

(2) Consulting with Counsel. The judge must allow the defendant reasonable opportunity to consult with counsel.

(3) **Detention or Release.** The judge must detain or release the defendant as provided by statute or these rules.

(4) **Plea.** A defendant may be asked to plead only under Rule 10.

(e) Procedure in a Misdemeanor Case. If the defendant is charged with a misdemeanor only, the judge must inform the defendant in accordance with Rule 58(b)(2).

(f) Video Teleconferencing. Video teleconferencing may be used to conduct an appearance under this rule if the defendant consents.